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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969/1970

No. 89

ALTON J. LEMON, ET AL., APPELLANTS

v.

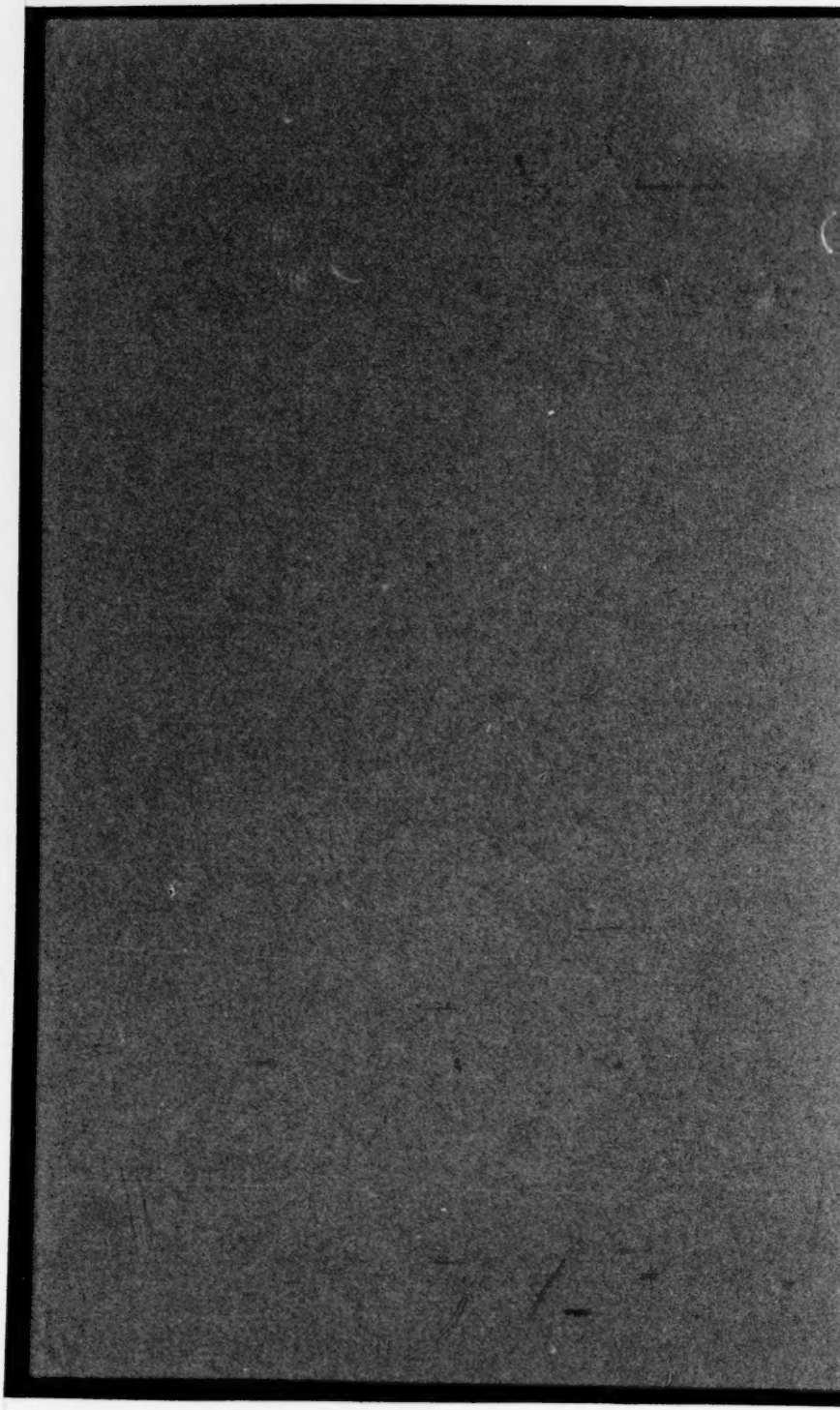
DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL., APPELLEES

AND

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS, INTERVENOR-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED FEBRUARY 16, 1970
JURISDICTION NOTED APRIL 20, 1970



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APPENDIX.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY AND BETH JACOBS SCHOOLS OF PHILADELPHIA

For plaintiff:

Henry W. Sawyer III

(Duane, Morris & Heckscher for applicant for intervention as deft. Pennsylvania Association of Independent Schools)

For defendant:

William C. Sennett—Edward Friedman for David H. Kurtzman, Grace M. Sloan

Semisch & Commons, 408 N. Easton Rd., Willow Grove Pa. 19090 for Phila. Montgomery Christian Academy

Samuel Rappaport for Akiba Hebrew Academy & Beth Jacob School of Phila.

William B. Ball—Joseph G. Skelly, 127 State St., Harrisburg Pa. 17101 for Archbishop Wood High School for Girls

James E. Gallagher Jr.—C. Clark Hodgson Jr. for St. Anthony's Roman Catholic Church School and Ukrainian Catholic Holy Ghost School

F. Raymond Heuges for Germantown Lutheran Acad.

DOCKET ENTRIES.

June 3, 1969. Complaint filed.

June 3, 1969. Summons exit.

June 3, 1969. Plffs. motion for Preliminary Injunction, filed.

June 9, 1969. Order Hastie Chief Judge Third Judicial Circuit designating Judge Francis L. Van Dusen and District Judge Alfred L. Luongo to sit with District Judge E. Mac Troutman as members of the court for hearing and determination of this action, filed.
6-11-69 entered

June 17, 1969. Order amending order constituting a three judge court substituting Chief Judge William H. Hastie to sit with District Judge Alfred L. Luongo and Judge E. Mac Troutman, filed.
6-18-69 entered

June 18, 1969. Appearance of William C. Sennett Esq. and Edward Friedman Esq. for Davis H. Kurtzman et al, filed.

June 18, 1969. Appearance of Semisch & Commons Esq. for Phila. Montgomery Christian Academy, filed.

June 19, 1969. Appearance of Samuel Rappaport Esq. for Akiba Hebrew Academy et al., filed.

June 19, 1969. Appearance of William B. Ball Esq. Joseph G. Skelly Esq. for Archbishop Wood High School for Girls, filed.

June 19, 1969. Appearance of James E. Gallagher Jr. Esq. C. Clark Hodgson Jr. Esq. for St. Anthony's Roman Catholic Church School et al., filed.

June 23, 1969. Appearance of F. Raymond Heuges, Esq. for Germantown Lutheran Academy, filed.

June 25, 1969. Motion of St. Anthony's Roman Catholic School and Ukrainian Catholic Holy Ghost School et al. for extension of time to file an answer, etc., filed.

June 25, 1969. Order that time for Defts. to answer, etc. is EXTENDED to 8/10/69, filed. 6/27/69 entered and copies mailed per C. C. Hodgson, Jr., Esq.

June 27, 1969. Defts. motion for and Order EXTENDING time for all defts. to answer etc. to Aug. 10, 1969, filed.

6/30/69 entered and copies mailed

July 7, 1969. Plffs.' interrogatories to defts. other than David Kurtzman & Grace Sloan, filed.

July 7, 1969. Plffs.' motion under Rule 34 for Production of Documents, filed.

July 25, 1969. Deft. Schools' motion to dismiss complaint for failure of plffs. to have standing to sue, filed.

July 25, 1969. Deft. Schools' motion to dismiss complaint for failure to state a claim upon which relief can be granted, filed.

July 25, 1969. Deft. Schools' motion under Rule 23(c), filed.

July 25, 1969. Deft. Schools' motion to strike paragraph five of plffs. complaint and for a more definite statement, filed.

July 30, 1969. Appearance of Duane, Morris & Heckscher, Esq. for applicant for intervention as a party deft. Pennsylvania Association of Independent Schools, filed.

July 30, 1969. Motion of The Pennsylvania Association of Independent Schools to intervene as a party deft., filed.

July 31, 1969. Motion of David H. Kurtzman, et al, to dismiss, filed.

July 31, 1969. Plffs.' memorandum respecting defts.' motion to dismiss for failure to state a cause of action, filed.

Aug. 5, 1969. Plffs. answer to defts. motion under Rule 23(c), filed.

Aug. 19, 1969. Deft. Schools' motion to dismiss the Complaint, filed.

Aug. 20, 1969. Summons returned: "On 6/24/69 served David H. Kurtzman; on 6/9/69 served Beth Jacob Schools, Archbishop Woods Girls High School, Ger-

mantown Lutheran Academy, Akiba Hebrew Academy, Phila. Montgomery Christian Academy, on 6/10/69 served St. Anthony's Roman Catholic School, Ukrainian Catholic Holy Ghost School; and on 6/11/69 served Grace Sloan" and filed.

Aug. 20, 1969. Pretrial Order GRANTING motion of Pa. Association of Independent Schools to intervene as a party deft. re argument on defts' motion to dismiss, without prejudice for more general intervention after disposition of motions; Defts' motions to dismiss for failure to state a cause of action, for failure to have standing to sue, and Defts' motions to strike a portion of the complaint shall be listed for argument at a date to be fixed by the Court; Defts' objections to plffs' interrogatories to be filed within 30 days, etc.; Vincent J. McCoola to be deposed before 10/1/69; that this action shall not be maintained as a class action; and that the last sentence of paragraph 7 of the complaint and similar allegations need not be answered by defts., filed. 8/22/69 entered and copies mailed.

Sept. 18, 1969. Objections of Germantown Lutheran Academy to plffs. interrogatories, filed.

Sept. 19, 1969. Objections of Phila. Montg. Christian Academy to plffs. interrogatories, filed.

Sept. 19, 1969. Objections of Akiba Hebrew Academy and Beth Jacob School to plff's interrogatories, filed.

Sept. 19, 1969. Objections of Archbishop Wood High School for Girls, et al. to plffs. interrogatories, filed.

Sept. 22, 1969. Deft. Schools' memorandum of law on the propriety of a three judge court, filed.

Sept. 22, 1969. Brief in support of deft. Schools' motion to strike paragraph five and for a more definite statement, filed.

Sept. 22, 1969. Brief in support of deft. Schools' motion to dismiss plffs. complaint for failure to state a claim upon which relief can be granted, filed.

Sept. 22, 1969. Brief in support of motion to dismiss plffs. complaint for failure of plffs. to have standing to sue, filed.

Sept. 22, 1969. Brief on motion to dismiss of deft. State Officials Kurtzman and Sloan, filed.

Oct. 1, 1969. Brief in response to defts. motion to dismiss for lack of standing, filed.

Oct. 1, 1969. Plffs. memorandum on the necessity of a three-judge court, filed.

Oct. 1, 1969. Plffs. memorandum contra defts. motion to dismiss, filed.

Oct. 7, 1969. Deft. Schools reply brief on motion to dismiss for failure to state a claim, filed.

Oct. 7, 1969. Deft. Schools reply brief on motion to dismiss for lack of standing, filed.

Oct. 13, 1969. Argued sur defts. motion to dismiss; defts. motion re 3-judge court and defts. motion to strike parts of complaint.

Oct. 13, 1969. Petition and Order granting leave to Penna. Assoc. of Independent Schools to file brief, filed. (10/14/69 entered.)

Oct. 16, 1969. Amended complaint, filed.

Oct. 16, 1969. Transcript of Oct. 13, 1969, filed.

Oct. 24, 1969. Deft. Schools' motion to strike representative allegations of the complaint and the amended complaint, or in the alternative, for a hearing under Rule 23(c), filed.

Oct. 24, 1969. Plffs. interrogatories to D. H. Kurtzman, filed.

Nov. 4, 1969. Attorney General's supplemental memorandum of law, filed.

Nov. 28, 1969. Opinion Troutman J. and Luongo J. and Order that defts.' motion to dismiss the complaint as to the organizational plffs. for lack of standing on all issues raised herein is GRANTED, defts. motion to dismiss complaint as to plffs. Lemon for lack of standing under the religious clauses of the First Amendment is DENIED; defts. motion to dismiss complaint as to remaining individual plffs. Priscilla Reardon and Betty J. Worrell, for lack of standing as taxpayers under the establishment clause is GRANTED; defts. motion to dismiss complaint as to individual plffs. for lack of standing under the free-exercise clause is DENIED, defts. motion to dismiss complaint as to all individual plffs. for lack of standing under equal protection clause is GRANTED and defts. motion to dismiss the complaint for failure of all plffs. to state a claim upon which relief can be granted is GRANTED AND dissenting Hastie Chief Circuit Judge, filed. (11-28-69 entered & notice mailed.)

Dec. 18, 1969. Notice of appeal by plffs. to the Supreme Court of the United States, and certificate of service, filed.

Jan. 20, 1970. Certified copy of record transmitted to Supreme Court of U. S.

Apr. 30, 1970. Certified copy of Order of Supreme Court of the U. S. stating that probable jurisdiction is noted and the case placed on the summary calendar, filed. (Copies to JJ. Troutman, Luongo and Hastie.)

COMPLAINT.

(Title Omitted in Printing.)

I. Statement as to Jurisdiction.

1. This is a civil action brought by the plaintiffs on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the Commonwealth of Pennsylvania for the support of, or to finance in whole or in part sectarian schools and other private schools whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion, and to declare such use as violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U. S. Code, Sections 1331, 1343, 2281, 2283, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand ($10,000) Dollars, as more fully appears hereinafter.

4. Each of the organizational plaintiffs is an association of persons resident in the Commonwealth of Pennsylvania, some of which individuals, in each case, are resident in the Eastern District of the Commonwealth of Pennsylvania and all of which organizations carry on activities in the Eastern District of Pennsylvania. All of the organizational plaintiffs share as a common objective the separation of church and state and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion.

The National Association for the Advancement of Colored People, with which the plaintiff Pennsylvania State Conference of the National Association for the Advancement of Colored People is affiliated, is an organization whose purpose it is to seek the elimination of racial discrimination through resort to judicial proceedings and otherwise.

5. Non-public schools, including the defendant schools are, de facto, racially segregated, either by religious requirement, design, tradition, policy, quota, cost, or residential pattern, and the aid rendered to such schools will perpetuate and promote such racial segregation in that said subsidy will further enable private schools to increase their enrollment, which increase in enrollment will be exclusively or almost exclusively white which, in turn, will increase the percentage of Negro enrollment in the public schools, thus aggrevating said de facto segregation and, in turn, strengthening the preference of many white parents to enroll their children in non-public schools (by reason of the racial prejudice of said parents or because the public schools will necessarily become inferior by reason of obtaining a smaller percentage of the total funds which the community is prepared to commit for education), which will, in turn, generate political presures for even greater tax aid to private schools, justified by their increased enrollment, with the ultimate result of promoting two school systems in the Eastern District of Pennsylvania—a public school system predominantly black, poor and inferior, and a non-public school system predominantly white, affluent and superior.

6. Each of the individual plaintiffs is a citizen and taxpayer in the United States and in the Commonwealth of Pennsylvania and is resident in the Eastern District of Pennsylvania. Plaintiff Alton J. Lemon is a Negro parent of a child attending a public school in Pennsylvania and sues herein in his own behalf and in behalf of others simi-

larly situated. It is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools.

7. Defendant David H. Kurtzman is Superintendent of Public Instruction of the Commonwealth of Pennsylvania and is sued herein in that capacity. Defendant Grace Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued herein in that capacity. Each of the institutional defendants is a secrtarian educational institution at the elementary or secondary level situated and operating within the Eastern District of Pennsylvania. They are sued herein as representative of all sectarian educational institutions in the Commonwealth of Pennsylvania and of all educational institutions in the Commonwealth of Pennsylvania whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion, the number of such sectarian and other educational institutions being too numerous to be conveniently joined as defendants in this suit.

II. Factual Allegations.

8. On June 19, 1968 the Governor of the Commonwealth of Pennsylvania signed into law Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, effective July 1, 1968, hereinafter referred to as the Act. (The text of the Act is set forth herein as Appendix A.) The Act purports to empower the State Superintendent of Public Instruction to contract for the purchase of secular education services from non-public schools located in the Commonwealth of Pennsylvania and authorizes him to promulgate rules and regulations to effectuate this purpose.

9. The Act further provides that revenues from State harness racing and State horse racing shall be used to finance the operations of the Act.

10. All revenues from State harness racing and State horse racing are funds which are the sole property of the Commonwealth of Pennsylvania.

11. In December, 1968 the defendant, David H. Kurtzman, in his capacity as State Superintendent of Public Instruction of the Commonwealth of Pennsylvania and acting pursuant to the authority of the Act, issued Rules and Regulations for the effectuation of the purposes of the Act.

12. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payment thereunder for "secular educational services" which are furnished as part of the regular program and curriculum of the respective schools and are limited to children regularly enrolled as pupils in the said schools and subject to the sectarian discipline and teaching of said schools.

13. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payment thereunder to sectarian educational institutions which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, and (3) conduct their operations, curriculums and programs to fulfill that purpose. On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are sectarian educational institutions which are (1) controlled by churches or religious organizations, (2) have as their purpose the

teaching, propagation and promotion of a particular religious faith, and (3) conduct their operations, curriculums and programs to fulfill that purpose.

14. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payments thereunder to private schools whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion. On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are private institutions whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion.

15. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payments thereunder to private schools which, by purpose or effect, discriminate by reason of race or religion in the employment of teachers and other persons to administer the educational services rendered by the school, including the educational services specified in the Act. On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are private institutions which, by purpose or effect, discriminate by reason of race or religion in the employment of teachers and other persons to administer the educational services specified in the Act.

16. Each of the institutional defendants has applied to the defendant State Superintendent of Public Instruction for payments under the Act as follows:

St. Anthony's Roman Catholic School West Third Street Chester, Pennsylvania	$ 2,444.31
Archbishop Woods Girls High School 655 York Road Warminster, Pennsylvania	46,447.21
Ukrainian Catholic Holy Ghost School Third and Booth Streets Chester, Pennsylvania	5,680.85
Germantown Lutheran Academy School House Lane and Green Street Philadelphia, Pennsylvania	31,775.00
Akiba Hebrew Academy 223 N. Highland Avenue Merion Station, Pennsylvania	88,022.67
Philadelphia Montgomery Christian Academy Greenwood Avenue Wyncote, Pennsylvania	32,308.00
Beth Jacobs Schools of Philadelphia Germantown Branch 143 W. Walnut Lane Philadelphia, Pennsylvania	67,700.00

Other private and sectarian educational institutions have applied for payments under the Act in the total amount of $16,833,884.32.

17. Unless enjoined by this Court the defendant State Superintendent of Public Instruction will approve for payment and the defendant State Treasurer will pay all or part of said sums to the respective private and sectarian schools and will in the future continue to pay large sums in effectuation of the purposes of the Act.

III. Causes of Action.

18. *First Count:* The Pennsylvania Nonpublic Elementary and Secondary Education Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer is a law respecting an establishment of religion in violation of the First Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment in that it (a) provides for direct financial aid out of state funds to sectarian schools, (b) finances and participates in the blending of sectarian and secular instruction, (c) has as its purpose the advancement of religion, and (d) has as its primary effect the advancement of religion.

19. *Second Count:* The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the State Treasurer prohibits the free exercise of religion on the part of the individual plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious education institutions.

20. *Third Count:* The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer violates the Fourteenth Amendment to the United States Constiution in that it constitutes a denial of the equal protection of the laws.

IV. Other Allegations.

21. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

22. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

23. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the U. S. Code to declare unconstitutional the Pennsylvania Nonpublic Elementary and Secondary Education Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer.

(2) That the defendant State Superintendent of Public Instruction be enjoined from approving the payment of any funds under the Act or otherwise participating in its administration, and the defendant State Treasurer be enjoined from paying any funds pursuant to the Act.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

June, 1969

/s/ Henry W. Sawyer, III,
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APPENDIX "A" TO COMPLAINT

PENNSYLVANIA NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT

Introduced as H. 2170 December 12, 1967. Amended by Senate June 11, 1968. Signed into law June 19, 1968.

AN ACT

To promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; creating a Nonpublic Elementary and Secondary Education Fund to finance the purchase of secular educational services from nonpublic schools located within the Commonwealth of Pennsylvania for the benefit of residents of the Commonwealth of Pennsylvania; authorizing the Superintendent of Public Instruction to enter into contracts to carry out the intent and purposes of this act, and to establish such rules and regulations as are necessary; providing for the payment of administrative costs incident to the operation of the act; providing procedures for reimbursement in payment for the rendering of secular educational service; and designating a portion of revenues of the State Harness Racing Fund and of the State Horse Racing Fund as the sources of funds.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Nonpublic Elementary and Secondary Education Act."

Section 2. Legislative Finding; Declaration of Policy. —It is hereby determined and declared as a matter of legislative finding—

(1) That a crisis in elementary and secondary education exists in the Nation and in the Commonwealth involving (i) the new recognition of our intellectual and cultural resources as prime national assets and of the national imperative now to spur the maximum educational development of every young American's capacity; (ii) rapidly increasing costs occasioned by the rise in school population, consequent demands for more teachers and facilities, new but costly demands, in the endeavor for excellence, upon education generally; the general impact of inflation upon the economy; and the struggle of the Commonwealth, commonly with many other states, to find sources by which to finance education, while also attempting to bear the mounting financial burden of the many other areas of modern State governmental responsibility;

(2) That nonpublic education in the Commonwealth today, as during past recent decades, bears the burden of educating more than twenty per cent of all elementary and secondary school pupils in Pennsylvania; that the requirements of the compulsory school attendance laws of the Commonwealth are fulfilled through nonpublic education;

(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education;

(4) That freedom to choose nonpublic education meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;

(5) That the Commonwealth has the right and freedom, in the fulfillment of its duties, to enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian;

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

Section 3. Definitions.—The following terms whenever used or referred to in this act shall have the following meanings, except in those instances where the context clearly indicates otherwise;

(1) "Nonpublic Elementary and Secondary Education Fund" shall mean the fund created by this act.

(2) "Secular educational service" shall mean the providing of instruction in a secular subject.

(3) "Secular subject" shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect.

(4) "Nonpublic school" shall mean any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law.

(5) "Purchase secular educational service" shall mean the purchase by the Superintendent of Public Instruction from a nonpublic school, pursuant to contract, of secular educational service at the reasonable cost thereof.

(6) "Reasonable cost" shall mean the actual cost to a nonpublic school of providing a secular educational service and shall be deemed to include solely the cost pertaining thereto of teachers' salaries, textbooks and instructional materials.

Section 4. Nonpublic Elementary and Secondary Education Fund.—There is hereby created for the special purpose of this act a Nonpublic Elementary and Secondary Education Fund dedicated to the particular use of purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science, and physical education, provided, however, that as a condition for payment by the Superintendent of Public Instruction for secular educational service rendered hereunder, the Superintendent of Public Instruction shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification ap-

proved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition.

Section 5. Administration.—The administration of this act shall be under the direction of the Superintendent of Public Instruction, who shall establish rules and regulations pertaining thereto, make contracts of every name and number, and execute all instruments necessary or convenient for the purchase of secular educational service hereunder. All expenses incurred in connection with the administration of this act shall be paid solely out of the Nonpublic Elementary and Secondary Education Fund and no money raised for the support of the public schools of the Commonwealth shall be used in connection with the administration of this act.

Section 6. Moneys for Fund.—(a) Permanent moneys. Into the Nonpublic Elementary and Secondary Education Fund shall be paid each year:

(1) All proceeds from horse racing up to the first ten million dollars ($10,000,000) realized by the State Horse Racing Fund established by the act of December 11, 1967 (Act No. 331), remaining after, and not required for, payment of all of the items of administrative cost set forth in subsection (b) of Section 18 of that act, plus

(2) One-half of all such horse racing proceeds in excess of the sum of ten million dollars ($10,000,000), the remaining half thereof to be paid into the General Fund.

(b) Temporary moneys. Until the time that proceeds in the amount of ten million dollars ($10,000,000) shall, in a given fiscal year, have paid into the Nonpublic Elementary

and Secondary Education Fund as provided for under subsection (a) of Section 6 hereof, three-fourths of the proceeds from harness racing realized by the State Harness Racing Fund established by the act of December 22, 1959 (P. L. 1978), as amended, remaining after and not required for, the payments provided for in subsections (b) and (d) of Section 16 of that act, shall be paid into the Nonpublic Elementary and Secondary Education Fund according to the following formula:

(1) The entire three-fourths of the harness racing proceeds for any fiscal year shall be paid into the Nonpublic Elementary and Secondary Education Fund until such year as the horse racing proceeds designated by this section for the said fund are of such amount that, combined with the harness racing proceeds, the sum of ten million dollars ($10,000,000) shall have been realized by the Nonpublic Elementary and Secondary Education Fund.

(2) Proceeds from harness racing shall cease to be paid into the Nonpublic Elementary and Secondary Education Fund for any fiscal year in which proceeds from horse racing, designated by this section for the Nonpublic Elementary and Secondary Education Fund, shall equal ten million dollars ($10,000,00).

Moneys in the Nonpublic Elementary and Secondary Education Fund are hereby appropriated to the Department of Public Instruction to be used by the Superintendent of Public Instruction solely for the purchase of secular educational service hereunder and administrative exepenses pertaining thereto as provided for in Section 5 of this act.

Section 7. Reimbursement Procedures.—(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms

and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered.

(b) Reimbursements for any fiscal year for the purchase of secular educational service hereunder shall not exceed the total amount of the moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund in that fiscal year.

(c) In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund shall be insufficient to pay the total amount of validated requests hereunder in reimbursement for that year, reimbursements shall be made in that proportion which the total amount of such requests bears to the total amount of moneys in the Nonpublic Elementary and Secondary Education Fund.

(d) The Budget Secretary shall, by July fifteenth of each year, certify to the Superintendent of Public Instruction, the total amount of money in the Nonpublic Elementary and Secondary Education Fund.

Section 8. Effective Date.—This act shall take effect July 1, 1968.

Section 9. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect, in all valid applications that are severable from the invalid applications.

MOTION FOR PRELIMINARY INJUNCTION.

(Title omitted in printing.)

Plaintiffs move the Court for a preliminary injunction enjoining the defendants Superintendent of Public Instruction and State Treasurer of the Commonwealth of Pennsylvania, pending determination of the above-captioned matter, from paying or processing for paying any funds pursuant to the Pennsylvania Nonpublic Elementary and Secondary Education Act.

HENRY W. SAWYER, III
Henry W. Sawyer, III

DEFENDANT SCHOOLS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE.

(Title omitted in printing.)

All Defendant schools respectfully move the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendants' favor on the ground that Plaintiffs do not have standing to maintain this action.

In support thereof, Defendants assign the following reasons:

I.

Individual Plaintiffs
ALTON J. LEMON, PRISCILLA REARDON and BETTY J. WORRELL.

1. The Complaint fails to allege that any of these Plaintiffs have contributed to the State harness racing or horse racing funds. Such funds are the sole source under the Act, out of which the Commonwealth purchases secular educational services.

2. The Complaint fails to allege facts which demonstrate the extent to which, if any, these Plaintiffs suffer any adverse financial effect resulting from the use of State harness racing or horse racing funds, with which the Commonwealth purchases secular educational services under the Act.

3. The Complaint fails to allege that the collection of funds by the Commonwealth for purchases under the Act

from persons who choose to attend harness and horse racing constitutes a program of taxation to which these Plaintiffs were compelled to contribute.

4. The Complaint fails to allege that any funds have been expended under the Act, except as incidental to purely regulatory activity.

5. The Complaint fails to allege facts sufficient to demonstrate that Plaintiff, Alton J. Lemon, has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue on behalf of all other persons similarly situated.

II.

Organizational Plaintiffs.
PENNSYLVANIA STATE EDUCATION ASSOCIATION,
PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
PENNSYLVANIA COUNCIL OF CHURCHES,
PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

6. Defendants incorporate herein by reference paragraphs 1, 2, 3, and 4 of this Motion, all of which apply with equal force to the Plaintiff organizations.

7. The Complaint fails to allege that any of these Plaintiff organizations are taxpayers.

8. The Complaint fails to allege that the Plaintiff organizations have a personal stake in the outcome of this litigation, apart from a common motivation to act as voluntary protectors of the public interest, or as "private attorneys general." The sharing of common viewpoints (Complaint, Paragraph 4) does not constitute an interest which entitles the Plaintiff organizations to complain herein.

9. The Complaint fails to allege any facts sufficient to show that the Plaintiff organizations bring this action due to circumstances rendering it impossible or perilous for any one of their respective members to sue.

10. The Complaint fails to allege facts showing that Plaintiffs Pennsylvania State Education Association or Pennsylvania Conference National Association for the Advancement of Colored People possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to the concept of freedom of religion or the governmental establishment of religion.

11. The Complaint fails to allege facts showing that any of the Plaintiff organizations, except the Pennsylvania Conference National Association for the Advancement of Colored People, possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to racial segregation.

12. The undersigned are authorized to state that all the Defendant schools join in the foregoing Motion.

WHEREFORE, Defendant schools respectfully pray the Court to enter an Order dismissing Plaintiffs' Complaint and to enter a Judgment of Dismissal in Defendants' favor.

BALL & SKELLY,
WILLIAM B. BALL,
Attorney for Defendant Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR. AND
C. CLARK HODGSON, JR.,
C. CLARK HODGSON, JR.,
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

DEFENDANT SCHOOLS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE.

(Title Omitted in Printing.)

AMENDED MOTION.

All Defendant schools respectfully move the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendants' favor on the ground that Plaintiffs do not have standing to maintain this action.

In support thereof, Defendants assign the following reasons:

I.

Individual Plaintiffs.
ALTON J. LEMON, PRISCILLA REARDON and BETTY J. WORRELL.

1. The Complaint fails to allege that any of these Plaintiffs have contributed to the State harness racing or horse racing funds. Such funds are the sole source under the Act, out of which the Commonwealth purchases secular educational services.

2. The Complaint fails to allege facts which demonstrate the extent to which, if any, these Plaintiffs suffer any adverse financial effect resulting from the use of State harness racing or horse racing funds, with which the Commonwealth purchases secular educational services under the Act.

3. The Complaint fails to allege that the collection of funds by the Commonwealth for purchases under the Act from persons who choose to attend harness and horse racing constitutes a program of taxation to which these Plaintiffs were compelled to contribute.

4. The Complaint fails to allege that any funds have been expended under the Act, except as incidental to purely regulatory activity.

5. The Complaint fails to allege facts sufficient to demonstrate that Plaintiff, Alton J. Lemon, has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue on behalf of all other persons similarly situated.

5A. The Complaint fails to allege any facts showing a personal stake, or adverse interest, on the part of these Plaintiffs on the issue of the denial of the equal protection of the laws.

II.

Organizational Plaintiffs.

PENNSYLVANIA STATE EDUCATION ASSOCIATION,
PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
PENNSYLVANIA COUNCIL OF CHURCHES,
PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

6. Defendants incorporate herein by reference paragraphs 1, 2, 3, and 4 of this Motion, all of which apply with equal force to the Plaintiff organizations.

7. The Complaint fails to allege that any of these Plaintiff organizations are taxpayers.

8. The Complaint fails to allege that the Plaintiff organizations have a personal stake in the outcome of this litigation, apart from a common motivation to act as voluntary protectors of the public interest, or as "private attorneys general". The sharing of common viewpoints (Complaint, Paragraph 4) does not constitute an interest which entitles the Plaintiff organizations to complain herein.

9. The Complaint fails to allege any facts sufficient to show that the Plaintiff organizations bring this action due to circumstances rendering it impossible or perilous for any one of their respective members to sue.

10. The Complaint fails to allege facts showing that Plaintiffs Pennsylvania State Education Association or Pennsylvania Conference National Association for the Advancement of Colored People possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to the concept of freedom of religion or the governmental establishment of religion.

11. The Complaint fails to allege facts showing that any of the Plaintiff organizations, except the Pennsylvania Conference National Association for the Advancement of Colored People, possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to racial segregation.

11A. The Complaint fails to allege any facts showing a personal stake, or adverse interest, on the part of these Plaintiffs on the issue of the denial of the equal protection of the laws.

12. The undersigned are authorized to state that all the Defendant schools join in the foregoing Motion.

WHEREFORE, Defendant schools respectfully pray the Court to enter an Order dismissing Plaintiffs' Complaint and to enter a Judgment of Dismissal in Defendants' favor.

BALL & SKELLY,
WILLIAM B. BALL,
Attorney for Defendant Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR. AND
C. CLARK HODGSON, JR.,
JAMES E. GALLAGHER, JR.
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

DEFENDANT SCHOOLS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

(Title Omitted in Printing.)

Defendant schools respectfully move the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendants' favor. In support thereof, Defendants assign the following reasons:

I.

FIRST COUNT.
PARAGRAPH 18—ESTABLISHMENT OF RELIGION.

1. The allegation, "(a)", of Paragraph 18, that the Act is unconstitutional on its face and as applied because it "provides for direct financial aid out of State funds to sectarian schools" fails to state a claim since the Act, which expresses the public policy of the Commonwealth, achieves solely the public and secular legislative purpose of providing secular education to students.

2. The allegation, "(b)", of Paragraph 18, that the Act is unconstitutional on its face and as applied because it "finances and participates in the blending of sectarian and secular instruction" fails to state a claim since the Act has an express secular legislative purpose and a primary effect which does not advance religion.

3. The Complaint fails to allege any facts sufficient to support the bare conclusory assertion made in "(c)" of Paragraph 18, that the Act, on its face, "has as its purpose the advancement of religion".

4. The allegation, "(c)" of Paragraph 18, that the Act is unconstitutional *as applied* because it "has as its purpose the advancement of religion" fails to state a claim because the constitutionality of the *application* of a statute is not determined by the constitutionality of its stated or implied purpose.

5. The allegation, "(d)" of Paragraph 18, that the Act is unconstitutional *on its face* because it "has as its primary effect the advancement of religion" fails to state a claim because the effects of a statute's application do not determine the constitutionality of the statute on its face.

6. The Complaint fails to allege any facts sufficient to support the bare conclusory assertion made in "(d)" of Paragraph 18, that the Act "has as its primary effect the advancement of religion".

II.

SECOND COUNT
PARAGRAPH 19—FREE EXERCISE OF RELIGION.

7. The Complaint fails to allege facts sufficient to show that the Act on its face "constitutes compulsory taxation", as alleged in Paragraph 19. Collections pursuant to the Act, with which the Commonwealth will make purchases under the Act, are from persons who freely choose to attend horse and harness races and does not constitute a program of compulsory taxation.

8. The Complaint fails to allege facts sufficient to show that the Act on its face requires or permits support of religion or religious educational institutions.

9. The allegation of Paragraph 19, that the Act is unconstitutional as applied because it "constitutes compulsory taxation for the support of religion or religious educational institutions" is insufficient as a matter of law, in that the Act, expressing the public policy of the Commonwealth, achieves solely the public and secular legislative purpose of providing secular education to students.

III.

THIRD COUNT.
PARAGRAPH 20—EQUAL PROTECTION OF THE LAWS.

10. The Complaint fails to allege that the Act on its face, either expressly or by implication, requires or permits any discriminatory State action.

11. The Complaint fails to allege facts sufficient to show that the Act, as applied, results in any discriminatory State action.

12. The Complaint fails to allege either expressly or by implication that the Act requires or permits an invidious classification or discrimination of any kind based upon race.

13. The allegations of the Complaint that the Commonwealth pays subsidy to schools which are de facto racially segregated fails to constitute an allegation of a denial of the equal protection of the laws.

14. The undersigned are authorized to state all the Defendant schools join in the foregoing Motion.

WHEREFORE, Defendant schools respectfully pray the Court to enter an Order dismissing Plaintiffs' Complaint for failure to state a claim upon which relief can be granted and to enter a Judgment of Dismissal in Defendants' favor.

BALL & SKELLY,

WILLIAM B. BALL,
Attorneys for Defendant, Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR., and
C. CLARK HODGSON, JR.,

C. CLARK HODGSON, JR.,
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

DEFENDANT SCHOOLS' MOTION UNDER RULE 23(c).

(Title omitted in printing.)

Defendant schools respectfully move the Court for a determination under Rule 23(c) that this action shall not be maintained as a class action, and assigns therefor the following reasons:

1. In paragraph seven of the Complaint, Plaintiffs allege that the Defendant schools are sued in this action "as representative of all sectarian educational institutions in the Commonwealth of Pennsylvania and of all educational institutions in the Commonwealth of Pennsylvania whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion. . . ."

2. The statewide group thus described in the Complaint does not constitute a class in relation to the three causes of action stated in the Complaint. The group includes sectarian schools, inter-denominational schools, non-sectarian schools, public schools, non-public schools, kindergartens, elementary schools, secondary schools, institutions of higher learning, schools for exceptional children, professional schools, trade schools, business schools and seminaries, that is, schools having in common solely the fact that they are educational institutions in the Commonwealth of Pennsylvania.

3. As to each of the causes of action set forth in the Complaint, no finding of fact respecting how the Act is applied in any one of the Defendant schools can be a finding of fact which is binding on any other Defendant school or any other member of the alleged class, including all schools under contract with the Commonwealth pursuant to the Act.

4. There are 1181 schools located in 55 out of the 67 counties of Pennsylvania which have entered into individual contracts with the Commonwealth under the Act. Among these schools, there exists an extremely wide diversity respecting religion and race, educational policies, instructional practices, admissions policies, responses to needs of the particular community served, courses offered and faculty membership.

5. As among the Defendant schools, there are questions of law and fact, respecting each cause of action, not common to all of these schools.

6. As between the Defendant schools, and the other members of the alleged class (including all schools under contract with the Commonwealth pursuant to the Act) there are questions of law and fact respecting each cause of action, not common to all.

7. The defenses of the Defendant schools are not typical of the defenses that might be asserted by members of the alleged class (including all schools under contract with the Commonwealth pursuant to the Act) of which the Defendant schools are alleged to be representative.

8. The Defendant schools cannot adequately protect the interests of the members of the alleged class, including all schools under contract with the Commonwealth pursuant to the Act.

9. Plaintiffs, having sued the Defendant schools as representatives of a class, have the burden of demonstrating that this action may be maintained under Rule 23 of the Federal Rules of Civil Procedure. Such a determination may properly be made only after hearing before the Court.

10. The undersigned are authorized to state that all Defendant schools join in the foregoing Motion.

WHEREFORE, the Defendant schools respectfully pray the Court:

(1) To make a determination that this action may not be maintained as a class action, or

(2) that if the Court upon the face of the Complaint and of this Motion cannot so rule, that it hold a hearing prior to any determination under Rule 23, or

(3) in the alternative, that it dismiss so much of Plaintiffs' Complaint as relates to the representativeness of the Defendant schools and Plaintiffs' claims that the Act is unconstitutional as applied, and proceed forthwith to a determination of the constitutionality of the Act on its face.

BALL & SKELLY,

WILLIAM B. BALL,
Attorney for Defendant Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR. AND
C. CLARK HODGSON, JR.,

C. CLARK HODGSON, JR.,
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

ANSWER TO DEFENDANTS' MOTION UNDER RULE 23(c).

(Title Omitted in Printing.)

In answer to the defendant schools' Motion for a ruling that the above action not be maintained as a class action, plaintiff makes the following answer: Plaintiff agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

MOTION OF THE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS TO INTERVENE AS A PARTY DEFENDANT.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools by its Attorneys, Duane, Morris & Heckscher, moves for leave to intervene as a defendant in the above action on the grounds, set forth more fully below:

1. The Pennsylvania Association of Independent Schools (PAIS) is a non-profit corporation organized and existing under the laws of Pennsylvania as an association concerned with matters affecting the interests of its member schools in respect of elementary and secondary education in this Commonwealth. Its membership consists of 94 elementary and secondary schools located throughout the Commonwealth. A list of the member schools is attached as Exhibit "A".

2. All member schools of PAIS are nonpublic schools within the meaning of Section 5603 (paragraph 4) and admit all qualified students without regard to race, creed or color.

3. All member schools of PAIS offer courses in one or more of the following: Mathematics, foreign language, physical science, and physical education. Accordingly, as nonpublic schools, they are entitled under Section 5604 to contract with the Commonwealth through the Nonpublic Elementary and Secondary Education Fund for the purchase of secular educational services in the above mentioned course areas and to receive in payment therefor monies from the Nonpublic Elementary and Secondary Education Fund.

4. The plaintiffs' complaint alleges that the Pennsylvania Nonpublic Elementary and Secondary Education Act is unconstitutional both on its face and as applied and seeks to prevent the payment of any monies to nonpublic schools under the above mentioned act.

5. PAIS, on behalf of its member schools has interests relating to the property which is the subject matter of the above action and is so situated that the disposition of the action may as a practical matter impair or impede the ability of its members to protect those interests unless your petitioners are granted leave to intervene.

6. The member schools of the PAIS have, or may have, defenses to the plaintiffs' claims which present both questions of law and of fact which are common to the above action.

7. Granting the PAIS leave to intervene in the above action will not delay or prejudice the adjudication of the rights of any of the original parties.

DUANE, MORRIS & HECKSCHER,

By:
Henry T. Reath,
Attorneys for Applicant for Intervention, Pennsylvania Association of Independent Schools.

LIST OF SCHOOLS IN THE PENNA. ASSOCIATION OF INDEPENDENT SCHOOLS.

Abington Friends School
Jenkintown, Penna. 19046

Academy of the Assumption
3480 W. School house Lane
Philadelphia, Penna. 19144

Academy of the New Church
Second Street Pike
Bryn Athyn, Pa. 19009

Academy of Notre Dame DeNamur
Sproul and Godfrey Roads
Villanova, Penna. 19085

Agnes Irwin School
Rosemont, Penna. 19010

Akiba Hebrew Academy
223 N. Highland Avenue
Merion, Penna. 19066

The Baldwin School
Bryn Mawr, Penna. 19010

The Booth School
Rosemont, Penna. 19010

The Buckingham Friends School
Lahaska, Penna. 18931

Carson Long Institute
New Bloomfield, Penna. 17068

Cecilian Academy
144 W. Carpenter Lane
Philadelphia, Pa. 19119

Charles E. Ellis School for Girls
Newtown Square, Penna. 19073

Chestnut Hill Academy
Philadelphia, Pa. 19118

Convent School of the Sacred Heart
City Line and Haverford Road
Philadelphia, Penna. 19151

Convent School of the Sacred Heart
Eden Hall, Philadelphia, Pa. 19114

Delaware County Christian School
Malin Road
Newtown Square, Penna. 19073

Divine Word Seminary
East Ridge Road
Girard, Penna. 16417

The Ellis School
6425 Fifth Avenue
Pittsburgh, Pa. 15206

The Episcopal Academy
City Line and Berwick Road
Philadelphia, Pa. 19131

The Erie Day School
1372 W. Sixth Street
Erie, Penna. 16505

Friends Central School
68th and City Line Avenue
Philadelphia, Pa. 19151

Friends Select School
1421 Arch Street
Philadelphia, Pa. 19102

George School
George School, Pa. 18940

Germantown Academy
Fort Washington, Pa. 19034

Germantown Friends School
31 W. Coulter Street
Philadelphia, Pa. 19144

Girard College High School
Girard Avenue at Corinthian Street
Philadelphia, Penna. 19130

Grier School
Tyrone, Pa. 16686

Gwynedd-Mercy Academy
Gwynedd Valley, Pa. 19437

Harrisburg Academy
Box 583, Harrisburg, Pa. 17043

Haverford School
Haverford, Pa. 19041

Haverford Friends School
Buck Lane
Haverford, Pa. 19041

Hill School
Pottstown, Pa. 19464

Kimberton Farm School
Phoenixville, Pa. 19460

Kiskiminetas Springs School
Saltsburg, Penna. 15681

Lancaster Country Day School
Lancaster, Pennsylvania 17603

The Lankenau School
3201 W. School House Lane
Philadelphia, Pa. 19144

La Salle College High School
8605 Cheltenham Avenue
Philadelphia, Penna. 19118

Lansdowne Friends School
Lansdowne, Penna. 19050

Linden Hall
Lititz, Pa. 17543

Malvern Preparatory School
Malvern, Penna. 19355

Mater Misericordiae Academy
Merion Station, Penna. 19066

The Meadowbrook School
Meadowbrook, Pa. 19046

Media Friends School
West Third Street
Media, Pa. 19063

Melrose Academy
Our Lady of Victory Hall
Old York Road
Philadelphia, Pa. 19117

Mercersburg Academy
Mercersburg, Pa. 17236

Mercyhurst Preparatory School
538 E. Grandview Boulevard
Erie, Penna. 16504

Milton Hershey School
Hershey, Penna. 17033

The Miquon School
Harts Lane
Miquon, Penna. 19452

Montgomery Country Day School
Wynnewood, Penna. 19096

Moravian Preparatory School
Bethlehem, Penna. 18018

Moravian Seminary for Girls
Bethlehem, Penna. 18017

Mount Saint Joseph Academy
Flourtown, Penna. 19031

Newtown Friends School
Newtown, Penna. 18940

Oak Lane Day School
Blue Bell, Penna. 19422

Our Lady of Mercy Academy
301 College Park Drive
Monroeville, Pa. 15146

Overbrook School for the Blind
64th and Malvern Streets
Philadelphia, Penna. 19151

Penn Hall Preparatory School
Chambersburg, Penna. 17201

Pennsylvania School for the Deaf
7500 Germantown Avenue
Philadelphia, Penna. 19119

Perkiomen School
Pennsburg, Penna. 18073

Phelps School
Malvern, Pa. 19355

The Rev. Martin Pryke
Executive Vice President
The Academy of the New Church
Bryn Athyn, Pa. 19009

Saint Benedict Academy
330 E. 10th Street
Erie, Penna. 16503

Saint Benedict's Academy
4530 Perrysville Avenue
Pittsburgh, Penna. 15229

Saint Edmund's Academy
5705 Darlington Road
Pittsburgh, Penna. 15217

Saint Francis Academy
1401 Hamilton Road
Pittsburgh, Penna. 15234

Saint John Kanty Preparatory School
3002 E. 38th Street
Erie, Penna. 16501

Saint Joseph's Preparatory School
18th and Thompson Streets
Philadelphia, Penna. 19121

Saint Mary's Academy
5401 Old York Road
Philadelphia, Pa. 19141

Saint Mary's Seminary
E. Division Street
North East, Penna. 16428

Saint Vincent College Preparatory School
Latrobe, Penna. 15650

The School in Rose Valley
Moylan, Penna. 19063

School of the Holy Child
Rosemont, Penna. 19010

School of the Holy Child
Sharon Hill, Penna. 19079

Scranton Preparatory School
Scranton, Penna. 18509

Sewickley Academy
Sewickley, Penna. 15143

Shady Side Academy
423 Fox Chapel Road
Pittsburgh, Pa. 15221

The Shipley School
Bryn Mawr, Penna. 19010

Solebury School
New Hope, Pa. 18938

The Stevens School
Crefeld and Laughlin Streets
Philadelphia, Pa. 19118

The Swain Country Day School
1100 S. 24th Street
Allentown, Pa. 18103

Swarthmore Presbyterian Nursery School
Harvard Avenue
Swarthmore, Pa. 19081

Valley Forge Military Academy
Wayne, Penna. 19087

Valley School of Ligonier
Box 616, Ligonier
Pennsylvania 15658

The Vanguard School
Box 423, Paoli, Pa. 19301

Villa Maria Academy
Malvern, Penna. 19355

Villa Maria Academy
2403 West Lake Road
Erie, Pa. 16505

Westtown School
Westtown, Penna. 19395

The William Penn Charter School
School Lane
Philadelphia, Pa. 19144

The Wyndcroft School
Rosedale Drive
Pottstown, Penna. 19464

York Country Day School
1071 Country Club Road
York, Penna. 17403

Winchester-Thurston School
555 Morewood Avenue
Pittsburgh, Penna. 15213

PRE-TRIAL ORDER.

(Title omitted in printing.)

AND Now, this 20th day of August, 1969, following pre-trial conference held the 18th day of August, 1969, IT IS ORDERED as follows:

1. The motion of the Pennsylvania Association of Independent Schools to intervene as a party defendant is GRANTED for the purpose of argument on defendants' motions to dismiss, without prejudice to said Association's application for more general intervention after disposition of the motions to dismiss.

2. Defendants' motions to dismiss for failure to state a cause of action, for failure to have standing to sue, and defendants' motions to strike a portion of the complaint and for a more definite statement (referred to as Points 7, 8, 10 and 12 in "Plaintiff's Suggested Procedure and Schedule" as submitted at the August 18, 1969 conference), shall be listed for argument at a date to be fixed by the Court after submission of briefs. Briefs for the moving parties shall be filed on or before September 15, 1969, and the answering briefs of plaintiffs shall be filed on or before September 24, 1969. The briefs shall cover, in addition to the motions to dismiss, the question of whether the case is appropriate to be heard by three judges or one judge in the event the motions to dismiss are denied.

3. Discovery:

(a) Objections by defendants to plaintiffs' interrogatories shall be filed within thirty (30) days. In the meantime, defendants shall compile the information for the filing of answers to interrogatories so that answers thereto may be filed promptly after disposition of the motions to dismiss in the event and to the extent that answers thereto shall be directed by the Court.

(b) Vincent J. McCoola shall be deposed at Harrisburg on or before October 1, 1969.

4. In the light of plaintiffs' "Answers to Defendants Motion under Rule 23(c)", IT IS FURTHER ORDERED (a) that the within action shall not be maintained as a class action; and (b) that the last sentence of paragraph 7 of the complaint and similar allegations of like nature contained in the complaint need not be answered by defendants.

BY THE COURT,

WILLIAM H. HASTIE,
William H. Hastie, *Cir. Chief Judge*,
ALFRED L. LUONGO,
Alfred L. Luongo, *J.*,
E. MAC TROUTMAN,
E. Mac Troutman, *J.*,

MOTION TO DISMISS.

(Title Omitted in Printing.)

The Defendants, David H. Kurtzman as Superintendent of Public Instruction of the Commonwealth of Pennsylvania and Grace M. Sloan as State Treasurer of the Commonwealth of Pennsylvania, by their attorneys, respectfully move this Honorable Court to dismiss Plaintiffs' Complaint and to enter judgment for Defendants and assign therefor the following reasons:

1. The Complaint fails to state a cause of action upon which relief can be granted.

2. Act No. 109, the Non-Public Elementary and Secondary Education Act approved by the Governor of Pennsylvania on June 19, 1968, represents a constitutional exercise of the sovereign authority of the Commonwealth of Pennsylvania.

3. The Plaintiffs seeks an adjudication of general unconstitutionality of a statute on the basis of conjectural and speculative consequences possibly resulting from the purchase of educational services from certain named defendants.

4. The general constitutionality of a statute may not be determined on the basis of its anticipated application to a particular case or to a limited class.

5. Plaintiffs' expectation of an unconstitutional interpretation and application of Act No. 109 by officials charged with its administration negates the presumption that state

officials will interpret and apply state statutes in a manne consistent with constitutional directives.

Respectfully submitted,

EDWARD FRIEDMAN,
Edward Friedman,
Counsel General,
WILLIAM C. SENNETT,
William C. Sennett,
Attorney General,
Attorneys for Defendant Kurtzman and Sloan.

AMENDED COMPLAINT.

(Title Omitted in Printing.)

Now come the plaintiffs by their attorney, Henry W. Sawyer, III, and, no responsive pleading having been filed thereto, amend the Complaint in the above-captioned case as follows:

1. By adding, after the second sentence in Paragraph 6, the following:

> On September 20, 1969, Alton J. Lemon went to Liberty Bell Park, a harness racing track, where he purchased a ticket of admission and paid the tax thereon.

2. The word "representative" in the fourth sentence of Paragraph 7 is deleted and the word "typical" is substituted therefor.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

PLAINTIFFS' MEMORANDUM ON THE NECESSITY OF A THREE-JUDGE COURT.

(Title Omitted in Printing.)

The defendants' briefs with respect to both the three-judge court and the meaning of the phrase "as applied" in the complaint purport to believe that, by including seven particular recipient schools as defendants the plaintiffs are suggesting that only in the Act's application to these particular schools (by reason of some peculiar aberration) is the Act unconstitutional as applied. On the other hand, the complaint constantly alleges that these schools are representative (i.e. typical), of the kinds of schools which are receiving the aid provided by Act 109, and yet the defendants move to delete these allegations. So the situation is that the defendants say that "the complaint concerns itself with certain (peculiar) applications of the Act, or, it will as soon as the court strikes from it the allegations which negate our contention."

The complaint attacks a pervasive, state-wide measure, operating in all sixty-seven counties of the state, administered by state-wide officials on a state-wide basis with state-wide effects, financed by state-wide funds. Its allegations doom the statute.

Assuming that the defendants' mien of bemused wonder with respect to the universality of plaintiffs' challenge is in good faith, let us say this: the Act is unconstitutional in every application throughout the sixty-seven counties of Pennsylvania, excepting only the possibility that some non-public school can be produced which (a) is non-church related, and (b) has no ceremonial religious observances and (c) does not discriminate on the basis of race in either admissions or employment. If there were a dozen score of such schools in Pennsylvania, the three-judge court would

still be called for (vs. 1140 non-public schools); if, in fact, there is one it has so far escaped plaintiffs' not totally oblivious notice.

28 U. S. C. § 2281 requires that a three-judge court be convened whenever a complainant seeks to restrain the enforcement, execution, or operation of a state statute upon the ground of unconstitutionality.* The requirement of § 2281 is jurisdictional. It is founded on the legislative policy of precluding the invalidation of important state legislation by a conventional suit in equity brought before a single federal judge. The purpose of the requirement is to safeguard the integrity of state legislation from capricious action by a single judge. *Phillips v. United States,* 312 U. S. 246, 61 S. Ct. 480 (1941).

In *Phillips* Justice Frankfurter succinctly set forth the basic test for determining the applicability of § 2281:

> "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy."

Id. at 251.

The basic determination is whether "state-wide doom" is involved or only illegal executive action which rests on an otherwise constitutional basis. *Id.* at 250.

When the allegations of the complaint in the present case are examined together with the statutory provisions

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* § 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

attacked it is clear that this case is within the mandate of § 2281. The complaint, by direct allegation, attacks the basic constitutionality of a statute which provides for state-wide aid to private schools. That statute is challenged both on its face and as applied as violative of the first and fourteenth amendments. Thus, the entire statutory scheme is claimed to be unconstitutional and is sought to be placed in jeopardy. The fact that particular grants are enumerated in the complaint as instances of unconstitutionality does not narrow the claim that the statute in its entirety is invalid. Certainly it would be a strained misreading of the complaint to in any way construe it as limited to a particular grant to a particular school or class of schools or to anything less than an attack on the entire statutory scheme.

The statute itself provides a comprehensive plan for the appropriation of money on an overall, state-wide basis, to all private educational institutions which may apply. Provision for the "purchase" of "secular education" in "sectarian" institutions and how this is to be accomplished in a "constitutional" manner are the very workings of the Act. And it is this statutory machinery in its entirety which is claimed to be unconstitutional in the present complaint. Obviously, we are not concerned here with the improper exercise of authority in a particular case where the action purports to rest on an otherwise constitutional foundation. In this case the foundation itself, the underlying statute, by which taxpayer funds are sought to be given to sectarian institutions is claimed to be invalid and the "doom" of that foundation on a state-wide basis is the obvious objective of the present case.

Judge Hastie has raised a question regarding the appropriateness of a three-judge court assuming it is conceivable that a particular school could constitutionally receive state aid under the statute. However, the fact that a particular grant may not be unconstitutional is not deter-

minative of the § 2281 issue. That fact bears *on the merits* of the entire controversy. It is not a test to be applied in determining whether *for jurisdictional purposes* a three-judge court is required. The ultimate issue on constitutionality must not be equated with the threshold question of determining proper jurisdiction to hear that issue. For that determination, we need not look beyond the complaint and the statute attacked. If, on this basis it is clear, as it must perforce be in this case, that a substantial claim of constitutional deprivation is raised a three-judge court is required.

The present case is on all fours with *Poindexter v. Louisiana,* 258 F. Supp. 158 (E. D. La. 1966). In that case, plaintiffs attacked the constitutionality of the Louisiana Legislature's attempt to use tuition grants to support so-called "private" schools for white children fleeing from desegregated public schools. On motion to dismiss the defendants contended that the case did not require a three-judge court since the complaint asked the court to enjoin only the constitutional *application* of a tuition grant statute and did not seek to have the statute itself declared unconstitutional. In answer to this contention, Judge Wisdom, on behalf of the three-judge court, in language which is as equally applicable here as it was in that case, stated:

> "The convening of a three-judge court is proper in this case. Section 2281 specifies that this special court is necessary if the plaintiffs seek to restrain the 'enforcement, execution, or operation' of a state 'statute' or an 'order' of a state administrative board or commission. The plaintiffs ask the court to enjoin the defendants and state officers from 'enforcing' the legislative program as administered or as operated under certain Louisiana statutes. A 'petition for injunction on the ground of the unconstitutionality of a statute

> as applied * * * requires a three-judge court.' Here the complaint does not seek to restrain unlawful executive action; here the legislative policy is under attack: 'The crux of the business [use of a three-judge court] is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and is the reconciling principle of the cases.' See *Hall v. St. Helena*, 197 F. Supp. at 658-659 in which a three-judge court enjoined the closing of schools under the earlier statute giving local school boards the authority to suspend or close public schools. See also *Herkness v. Krion*, 1928, 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198 in which the Supreme Court rejected the district court's distinction between an allegation of unconstitutional action on the part of state officers as opposed to allegation of the unconstitutionality of the statute under which they acted.
>
> The constitutional contention is substantial. The plaintiffs need not conclusively demonstrate in the complaint the unconstitutionality of the statutes or their application. 'For jurisdictional purposes it suffices that a substantial claim of deprivation has been made.' ''

Id. at 165.

But, it now appears that defendants, in fact, do not dispute that a three-judge court is required. Indeed, as we read their brief they agree that such a court is obviously necessary. What defendants attempt, however, is to transform this *jurisdictional requirement* into some inexplicable limitation on the scope of the evidence which the Court, once properly convened, can consider *on the merits* and that a three-judge court is limited to considering facial unconstitutionality. Dozens of cases refute this, the most recent

in this church-state field being *Schempp*. Thus, by the use of quotations from cases testing whether a three-judge court was not proper where the legality of particular activities unrelated to state-wide legislative action was involved they improperly conclude that once a three-judge court is convened it cannot hear evidence dealing with specific instances of claimed illegality, notwithstanding their bearing on the constitutionality of the entire statutory scheme. This is a non sequitur.

Accepting defendants contention, a three-judge court would always be limited in determining constitutionality to a review of the pleadings. Nothing in § 2281 lends any support to such a contention. Obviously, three-judge jurisdiction cannot be confined to cases where unconstitutionality appears on the face of the statute. See *Poindexter v. Louisiana, supra.* What evidence a court may hear in a particular case is a matter of rules of evidence within the framework of the issues raised and has nothing whatsoever to do with § 2281. To impose the inhibition sought by the defendants in this case would unreasonably restrict the court without in any way implementing the basic policy of § 2281.

Respectfully submitted,

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EXCERPT FROM ORAL ARGUMENT.

(Title omitted in printing.)

[86]

MR. SAWYER: I have a section dealing with that, and, in fact, somewhat expanded with a few additional cases than what I said about it in my brief, and we will be arriving at almost in a moment, your Honor, in the progression of my thoughts here today.

I wanted to review the allegations of the complaint in terms of what are the exact points of unconstitutionality—I just want to label them at this point—that it challenges. First it says—and there are five separate grounds of unconstitutionality, and it is our contention that if we satisfy the Court on any one of them, that the bill goes down. In other words, these are separate, and although they have relationship to one another, if we prevail in the sense of convincing the Court that what we say is indeed true legally and factually, these are all separate grounds.

First, that the bill's purpose is to aid religion.

Secondly, that the bill's primary effect is to aid religion. Not a secular effect, but a religious effect.

Point 3, that the purchase of services is window dressing, that it is a device. And that if it is not a device, that the State is doing something forbidden; i.e.,

[87]

it is attempting to serve a secular end by religious means.

Four, that the Act prefers one religion over another, which legislation may not do.

And five, that it creates the kind of forbidden interdependence between the State and religious organizations, that is unconstitutional.

Now, let me say here that there has been this undercurrent constantly—and it is a perfectly understandable strategy on the part of defendants, to speak as if only facial constitutionality can be considered at this point. There again they misapprehend the motion to dismiss, because I have alleged both facial and applied. And when I say "applied"—constitutionality as applied, I mean it in the sense in which it is I understand generally used, and that is that you look at the general effect of the application of the statute. Constitutionality as applied in the cases is not confined to an application which by some maladministration only affects a particular and specific application.

I am not saying, and I think I have made this clear, that this Act is only unconstitutional as to these defendant schools. I am talking about it being unconstitutional in its entire purpose, thrust and effect in 67 counties of the State of Pennsylvania. I don't want to trench on the three-judge court issue, and that comes close to it. Mr.

[88]

Pfeffer is going to talk about it. But we are not here just talking about facial constitutionality. Nor, I will agree, however, are we here talking about a particular individual quirk which makes it let's say unconstitutional as to one of the defendants. But "applied" is broader than that.

Now, everybody agrees as to what the test is. My brief, and the defendants' brief, all the defendants' brief agrees on what we can label the McGowan-Schempp-Allen test. When does the Court use this test? This test is used by the Court whenever the issue is of the kind that we have here, where the question must be posed: is the primary thrust, purpose, intent, effect of this Act to aid a religious institution with only consequential benefits over to an individual, or is the primary thrust to aid an individual in a legitimate,

let us say, welfare need, in which the effect in behalf of the religious institution is consequential? And the test is that —let's read it, as it is very short. I think it is worth it.

"The test may be stated as follows:—" This is the latest statement of it in Allen. You find it in Schempp, and it was originated in McGowan, with a slight extra flourish which I will speak of. It really originated with Justice Warren in McGowan.

DEFENDANT SCHOOLS' MOTION TO STRIKE REPRESENTATIVE ALLEGATIONS OF THE COMPLAINT AND THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR A HEARING UNDER RULE 23(c).

(Title Omitted in Printing.)

Defendant Schools, by their respective attorneys, respectfully move the Court to enter an Order striking from the Complaint and the Amended Complaint all allegations of "representativeness" or "typicalness"* and direct that the actions proceed as against the seven named Defendant Schools in their individual and not in any other capacities, or, in the alternative, to order a hearing in accordance with Rule 23(c). In support thereof, Defendants assign the following reasons:

1. In paragraph 7 of the Complaint, Plaintiffs averred that the Defendant Schools are representative of all sec-

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* The allegations of representativeness to which Defendant Schools refer are:

(a) *Complaint,* paragraph 7:

> Each of the institutional defendants is a sectarian educational institution at the elementary or secondary level situated and operating within the Eastern District of Pennsylvania. They are sued herein as representative of all sectarian educational institutions in the Commonwealth of Pennsylvania whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion, the number of such sectarian and other educational institutions being too numerous to be conveniently joined as defendants in this suit.

(b) *Amended Complaint,* wherein the word representative in the fourth sentence of paragraph 7 is deleted and the word "typical" is substituted.

(c) *Complaint,* paragraphs 12, 13, 14 and 15 insofar as they purport to describe activities of the members of the class of which the Defendant Schools are alleged to be representative. See particularly the language "most of the other educational institutions" (paragraphs 13, 14 and 15).

tarian institutions in the Commonwealth and are too numerous to be conveniently joined as Defendants, thereby invoking the class action machinery provided for under Rule 23.

2. Thereafter, on July 25, 1969, Defendant Schools filed a Motion under Rule 23 requesting the Court to hold a hearing for the purposes of determining whether or not the action may be maintained as a class action.

3. At the first pre-trial conference on July 31, 1969, counsel for Plaintiffs stated that the action would not be maintained as a class action. On August 4, 1969, Plaintiffs filed an Answer to Defendants' Rule 23 Motion, stating: "Plaintiff agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure." However, counsel's letter of enclosure, dated August 4th, contained the following statement:

> So that there will be no misunderstanding, the complainants do allege that the defendant schools are representative in certain particulars of all the schools who are the beneficiaries of the Act.

In spite of Plaintiffs' Answer, it was clear that counsel believed that Defendant Schools were representative of all the schools who are beneficiaries under the Act.

4. The contrast between Plaintiffs' Answer to Defendants' Motion, and counsel's covering letter is evident. As a result, Defendant Schools again raised this question at the second pre-trial conference on August 18, 1969.

5. In the course of the discussion at the second pre-trial conference, Defendant Schools understood the Court to say that the pre-trial Order would remove the last sentence from

paragraph 7 of the Complaint. On August 20, 1969, the Court entered a pre-trial Order directing that the action "shall not be maintained as a class action" but that the allegations of representativeness "need not be answered by defendants." Thus, the class action features of this suit remained in the Complaint.

6. Plaintiffs' Memorandum of October 1, 1969 respecting the necessity of a three-judge court made it plain that counsel was still treating the action as a class action, but was trying to avoid the necessity of proving the representativeness of the named schools as required by Rule 23. Note the following language from Plaintiffs' Memorandum:

> The defendants' briefs with respect to both the three-judge court and the meaning of the phrase 'as applied' in the complaint purport to believe that, by including seven particular recipient schools as defendants the plaintiffs are suggesting that only in the Act's application to these particular schools (by reason of some peculiar aberration) is the Act unconstitutional as applied. *On the other hand, the complaint constantly alleges that these schools are representative (i.e. typical), of the kinds of schools which are receiving the aid provided by Act 109, and yet the defendants move to delete these allegations.* (Emphasis supplied. Plaintiffs' Memorandum, page 1.)

7. This memorandum necessitated Defendants again addressing themselves to this issue at oral argument. Plaintiffs' response was to file on October 16, 1969 an Amended Complaint reading in part:

> The word "representative" in the fourth sentence of paragraph 7 is deleted and the word "typical" is substituted.

This language in the light of Plaintiffs' prior acknowledgement that the words "typical" and "representative" are identical, clearly signifies their intention to pursue a class action using synonyms.

8. The terms "typical" or "representative" are not ordinary descriptive adjectives when employed to describe parties sued as part of a larger group at whom a complaint is aimed. The words import the core characteristic of a class action, as to which the subjective intent of the pleader is irrelevant. It is one thing to call a person a "typical scholar", or a piece of music "representative American music": the employment of these adjectives invokes no legal consequences to anyone or to anything. While denying that this is a class action, Plaintiffs' statements and actions demonstrate that they intend the most specific legal consequences to 1100 or more schools not on this record, that is, to subject these schools to judgment in this case without an opportunity to be held under Rule 23.

9. Defendant Schools' view there can be only two alternatives: (a) either this action will proceed as a class action in which Plaintiffs will have to prove that the seven schools are representative of the other beneficiaries under the Act, or (b) the application claims shall be heard only as to these seven named Defendant Schools in their individual capacity and no other capacity. It is obvious that Plaintiffs have attempted to mold a middle ground which will offer the benefits of alleging representativeness with none of the burdens of proving this factual allegation.

WHEREFORE, Defendant Schools respectfully pray the Court to enter an Order striking from the Complaint and the Amended Complaint all allegations of representative-

ness, typicalness and the like, or in the alternative to order a hearing in accordance with Rule 23.

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ATTORNEY GENERAL'S SUPPLEMENTAL MEMORANDUM OF LAW.

(Title omitted in printing.)

The Commonwealth of Pennsylvania pursuant to leave granted by your Honorable Court respectfully submits the following memorandum with respect to the meaning and intent of the Governor's Code of Fair Practices promulgated by the Honorable Raymond P. Shafer, Governor of Pennsylvania on April 25, 1967.

Under the Constitution and laws of Pennsylvania, the supreme executive power of the Commonwealth is vested in the Governor whose duty it is to take care that the laws be faithfully executed.[1]

> "* * * The Governor is designated as the officer having the supreme executive power. He is the highest authority in the executive department, and his power is supreme in the exercise of his judgment or discretion. He bears the same relation to the state as the President does to the United States and, in the discharge of his political duties, is entitled to the same immunities, privileges, and exemptions." 24 Am. Jur. at page 824.

Pursuant thereto, the Governor's Code of Fair Practices was established which inter alia provides:

> "Article VII. Public Contracts
>
> Every State contract for public works or for goods or services shall contain a provision baring discrimination on account of race, color, religious creed, ancestry, age, national origin, or sex and such contractural provisions shall be fully and effectively enforced."

1. Pennsylvania Constitution, Article IV, Section 2; The Administrative Code of April 9, 1929, P. L. 177, Section 701, 71 P. S. 241, et seq.

The said provision has force and effect equal to law in that it is binding upon all departments and agencies of state government under the Governor's jurisdiction subject to the interpretation thereof hereinafter discussed. To that extent the directives thereof become an integral part of every statute and regulation affecting the executive branch of the state government without the necessity for physical incorporation therein.

The statement of executive policy enunciated by Executive Directive No. 21 is consistent with and in furtherance of Commonwealth policy as legislatively expressed in the Human Relations Act of October 27, 1955, P. L. 744, 43 P. S. 951 et seq. and the Fair Educational Opportunities Act of July 19, 1961, P. L. 776, 24 P. S. 5001 et seq. The Human Relations Act condemns the practice or policy of discrimination against individuals or groups *in employment or housing accommodations* by reason of their race, color, religious creed, ancestry, age or national origin. The Fair Educational Opportunities Act declares it to be an unfair educational practice for an educational institution to exclude or limit or otherwise discriminate because of race, religion, color, ancestry or national origin. Significantly, it specifically excludes from the definition of "educational institution" religious or denominational educational institution. It defines such institution to mean:[2]

> "* * * an educational institution which is operated, supervised, controlled or sustained primarily by a religious or denominational organization, or is one which is stated by the parent church body to be and is, in fact, officially related to that church by being represented on the board of the institution, and by providing substantial financial assistance and which has certified,

2. 24 P. S. 5003(2).

in writing, to the commission that it is a religious or denominational educational institution."

Section 2 of the act which declares the policy of the Commonwealth states that:[3]

> "It is recognized that there is a fundamental American right for members of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith. *In such institutions students, otherwise qualified, should have equal opportunity to attend therein without discrimination because of race, color, ancestry or national origin.*

The foregoing policy is reemphasized in Section 4 of the act wherein it is provided:[4]

> "Nothing in this section shall be deemed to affect in any way the right of religious or denominational educational institutions to select its students exclusively or primarily from members of such religion or denomination, or from giving preference in such selection to such members."

Thus the Legislature of Pennsylvania has recognized and emphasized the right of religiously oriented schools to give preference in selection to persons of a particular faith so long as they do not discriminate on account of race, color, ancestry or national origin. This proviso preserves and maintains the state's condemnation of all manner of discrimination while at the same time recognizing that certain educational institutions may give priority to persons of a particular faith seeking admission thereto without being guilty of invidious discrimination.

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3. 24 P. S. 5002(c).

4. 24 P. S. 5004(5-c).

Such invidious discrimination does not result where a policy of a religiously affiliated agency gives preference in admission to persons of the same religion.

Furthermore, the enactment of Act No. 109 of 1968, the statute here under consideration, is obviously designed to aid all non-public schools including those affiliated with a particular religion. This is manifest by its strict requirements that only secular subjects not including any subject matter expressing religious teaching or the morals or forms of worship of any sect shall be purchased under its authority.[5]

> " 'Secular subject' shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms or worship of any sect."

In proclaiming Executive Directive No. 21, Governor Shafer stated that:

> "In the conduct of its affairs, it is incumbent upon State government to be the leader to honor and fulfill the principles and provisions of law which the Legislature has established as the standard policies for the Commonwealth."

The meaning and effect of Article VII of the Governor's Code of Fair Practices can best be determined by reference to the anti-discrimination legislation above discussed. This is a typical case requiring the application of the Rule of Statutory Construction applying to laws in pari materia. That rule which has been incorporated into Pennsylvania's Law of Statutory Construction[6] defines laws as being in

5. Act 109 of 1968, Section 3.

6. Act of May 28, 1937, P. L. 1019, Section 62, 46 P. S. 562.

pari materia when they relate to the same class of persons or things and directs that such laws shall be construed together as one law if possible. It requires that statutes are to be construed in harmony with the existing law and as a part of a general and uniform system of jurisprudence. If such laws can be made to stand together, effect should be given to all their related provisions as far as possible. [In re *Peplinski's Estate*, 155 Pa. Super. 564 (1941) and *Kelly v. City of Philadelphia*, 382 Pa. 459 (1955).] The resolution and statutes under consideration all treat the subject of invidious discrimination. The relationship between them is patently obvious. We must presume that in promulgating the Code of Fair Practices, the Governor intended, as he stated therein, to "honor and fulfill the principles and provisions of law which the Legislature has established."

It is respectfully submitted that the position of the Commonwealth is consistent with the principles established by the Supreme Court of the United States in *Board of Education v. Allen*,[7] *Everson v. Board of Education*,[8] *Rhoades v. Abington Township School District*[9] and *Pierce v. Society of Sisters*.[10]

CONCLUSION.

It is the position of the Commonwealth that the meaning and effect of the Governor's Code of Fair Practices as expressed in Executive Directive No. 21 must be interpreted in the light of existing statutory law and that the directive of Article VII thereof relating to public contracts where educational services are concerned permits the purchase of secular educational services from a religious or denominational educational institution which gives preference in ad-

7. 392 U. S. 236 (1968).
8. 330 U. S. 1 (1947).
9. 424 Pa. 202 (1967), appeal dismissed 389 U. S. 11 (1967).
10. 268 U. S. 510 (1925).

mission policies to persons of the same religion as that to which the institution is affiliated so long as it does not discriminate on account of race, color, age, national origin or ancestry.

Respectfully submitted,

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WILLIAM C. SENNETT,
Attorney General.

A copy of this memorandum is being addressed to the Secretary of Education with the directive that he comply with the conclusions expressed therein. Under the laws of the Commonwealth of Pennsylvania, that opinion is binding upon and must be followed by the Secretary of Education. Administrative Code of 1929, *supra,* 71 P. S. 192; *Commonwealth ex rel. Shockley v. Ross,* 53 Dauph. 329 (1943); *Commonwealth ex rel. Sennett v. Minehart,* 88 Dauph. 279 at 288 (1967).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA

Before WILLIAM H. HASTIE, *Chief Judge, Circuit Court,*
ALFRED L. LUONGO and E. MAC TROUTMAN,
Judges, District Court

OPINION AND ORDER.

TROUTMAN, *J.*

The present suit seeks to enjoin the alleged unconstitutional approval and expenditure of State funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act[1] (hereinafter the Education Act). Since the complaint alleges the unconstitutionality of a statute of state-wide application, this three-judge panel has been convened. 28 U. S. C. §§ 2281-84.[2]

Jurisdiction is based on the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 28 U. S. C. § 1343. Presently before the Court are defendants' motions to dismiss for lack of standing and for failure to state a claim upon which relief can be granted.

The individual plaintiffs are citizens and taxpayers of the Commonwealth of Pennsylvania and their claims are brought in that capacity. Plaintiff Lemon, in addition to being a citizen and taxpayer, is a Negro parent of a child attending public school in Pennsylvania. The organizational plaintiffs are associations of persons resident in the Commonwealth of Pennsylvania which "share as a common objective the separation of Church and State and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion."[3] The National Association for the Advancement of Colored People, (NAACP) with which the plaintiff, Pennsylvania State Conference of the NAACP, is affiliated, "is

1. Nonpublic Elementary and Secondary Education Act, 24 P. S. § 5601 et seq. (Supp. 1969). The complete text of the statute appears in Appendix A, *infra*.

2. See *Ex parte Bransford*, 310 U. S. 354 (1940).

3. Complaint at p. 2.

an organization whose purpose is to seek the elimination of racial discrimination through resort to judicial proceedings and otherwise".[4] Each of the organizational plaintiffs asserts its standing to sue as a party-plaintiff in the instant suit.

The defendant Kurtzman is the Pennsylvania Superintendent of Public Instruction who is responsible for approving the allocation of funds under the Pennsylvania Education Act. Defendant Sloan is the State Treasurer of the Commonwealth of Pennsylvania who will allocate the approved funds. The seven defendant schools are sectarian elementary and secondary educational institutions situated within the Eastern District of Pennsylvania, who have contracted with the Commonwealth for the purchase of secular educational services under the Education Act.[5]

I.

The Nonpublic Elementary and Secondary Education Act.

The Education Act was signed into law by the Governor of Pennsylvania on June 19, 1968. The Act empowers the State Superintendent of Public Instruction to contract for the purchase of "secular educational services" from nonpublic schools located in the Commonwealth of Pennsylvania which fulfill the compulsory school attendance requirements under Pennsylvania law.

In its legislative findings and declaration of policy[6] the Pennsylvania Legislature has determined that a crisis exists in elementary and secondary education in Pennsylvania due to rapid increases in costs and school population

4. Complaint at p. 2.

5. The Pennsylvania Association of Independent Schools (PAIS) has been permitted to intervene as a party-defendant for the limited purpose of arguing the defendants' motion to dismiss.

6. 24 P. S. § 5602, Appendix A, *infra*.

and consequent demands for more teachers and facilities. It was also found that twenty per cent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's compulsory school attendance laws in nonpublic schools. It has been further recognized that elementary and secondary education constitutes a public welfare purpose and that nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of this public purpose. The Legislature, therefore, conclude that it is a governmental duty to support the achievement of this public welfare purpose by supporting the purely secular objectives of nonpublic education.

Briefly, the operational scheme of the statute permits the Superintendent of Public Instruction to enter into contracts[7] with nonpublic schools, whether sectarian or nonsectarian, for the purchase of "secular educational services". These "secular educational services" are defined[8] to mean "providing of instruction in a secular subject", while secular subject is defined as "any course which is presented by the public schools of the Commonwealth and shall not include any subject-matter expressing religious teaching, or the morals or forms of worship of any sect".

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7. The Pennsylvania Supreme Court has recognized that the State may contract with sectarian institutions for the purchase of needed public services. *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507 (1956). Furthermore, Pennsylvania has also recognized that such contracts are not "appropriations" to aid such organizations under the Pennsylvania Constitution, Art. III, § 29. *Schade, supra;* see also *Commonwealth v. Perkins*, 342 Pa. 529 (1941). Apparently, the reason for adopting a contractual method for carrying forth the aims of the Education Act was to avoid possible conflicts with the strictures of the Pennsylvania Constitution. Regardless of the method employed to distribute funds under the Education Act, the constitutional result we reach today would not be changed. As long as the purpose and primary effect of the statute neither advances nor inhibits religion, the constitutional standard is satisfied.

8. All definitions appear in 24 P. S. § 5603, Appendix A, *infra*.

All purchases of secular educational services under the Education Act are to be at the "actual cost" of three items of such service: teacher salaries, textbooks and instructional materials. The Education Act further limits all purchases of secular educational services to courses in mathematics, modern foreign languages, physical science, and physical education.[9] As a condition for payment under the Act, the Superintendent of Public Instruction must approve all textbooks and instructional materials employed in the instruction rendered. In addition, a satisfactory level of student performance in standardized tests must have been attained and within five years of the date of the Act all secular educational services for which reimbursement is sought must be rendered by teachers holding State certification equal to the standard for teachers in public schools.[10]

Payment under the Act in discharge of the contractual obligation may be made only after service has been rendered. Section 5607(a) provides in relevant part that:

> Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such account shall be subject to audit by the Auditor General.

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9. The definitions in the "Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act" provide that "Secular educational service purchased under this Act shall consist solely of courses in the subjects of mathematics, modern foreign languages, physical science, and physical education". Definition 8 at p. 3.

10. See 24 P. S. § 5604, Appendix A, *infra*.

Funds for the operation and administration of the Education Act are to be drawn only from the nonpublic elementary and secondary education fund. The monies comprising this fund are to be taken exclusively from the proceeds of State horse racing and harness racing.[11]

Defendants, in their brief, have informed the Court that 1181 nonpublic elementary and secondary schools in Pennsylvania, having a total pupil population of 535,215 children, and located in 55 of Pennsylvania's 67 counties, are now under contract with the Commonwealth pursuant to the Education Act. One year's performance under contract has now been rendered and, on September 2, 1969, the Commonwealth paid its first quarterly installment obligation.

II.

Standing of the Individual and Organizational Plaintiffs.

The defendants have moved pursuant to Rule 12(b) to dismiss plaintiffs' complaint on the grounds that both the organizational and individual plaintiffs lack standing to maintain the instant suit under the religious clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment.[12]

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11. Section 5606 of the Act prohibits the use of any monies raised by the Commonwealth for the support of the public schools to pay for services or administrative costs under the Education Act. In December, 1968, extensive regulations were promulgated by the Superintendent of Public Instruction which further delineate the details and operating procedures of the Act and further elaborate its secular, fiscal, and quality controls.

12. For the purposes of standing, we consider plaintiffs allegations under the Civil Rights Act, 42 U. S. C. § 1343, to be substantial—equivalents to the equal protection claims raised. We have made, therefore, no separate analysis of standing under the Civil Rights Act, but rather treat these contentions in our analysis of standing under the equal protection clause.

A. Organizational Plaintiffs.

The organizational plaintiffs assert their standing solely on the ground that they are organizations established for the purposes of either maintaining the separation of Church and State or preventing racial discrimination. Nothing further is alleged with respect to the issues of the instant case than the fact that these organizations share a common interest in the outcome of this suit as it may or may not comport with their particular organizational goals. The fundamental aspect of standing, as recently articulated by the Supreme Court, is that "it focuses on the party seeking to get his complaint before a federal court . . ." *Flast v. Cohen,* 382 U. S. 83, 99 (1967). The *Flast* decision further noted that "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a *personal stake* in the outcome of the controversy' . . . and whether the dispute touches upon '*the legal relations of parties having adverse legal interests.* . . .'" *Flast v. Cohen, supra,* at 101 (Emphasis added).

On the basis of the allegations set forth in the complaint as they pertain to the organizational plaintiffs, we can perceive of no *personal stake* or *adverse legal interests* of these plaintiffs which demonstrate their standing as *parties* to the instant suit. Regardless of the good motives of these organizations, the mere fact that the instant case may result in a decision which may be in accord with or adverse to the respective general purposes of these organizations we believe is insufficient to establish standing to sue as an affected party in interest.[13] Consequently, the organiza-

13. The organizational plaintiffs have argued that they should be permitted to sue here as private attorneys general. The Court, however, perceives no precedent or persuasive reason to adopt this theory in the instant case. Indeed, to do so may result in the rendering of an advisory opinion on a constitutional matter in contravention of Article III of the Constitution. See *Muskrat v. United States,* 219 U. S. 346 (1911).

tional plaintiffs have failed to establish standing as to both the religious and equal protection issues involved in the instant case.

B. Individual Plaintiffs.

The individual plaintiffs, Alton Lemon, Priscilla Reardon and Betty J. Worrell, assert standing under the religious clauses of the First Amendment and the equal protection clause based upon varied allegations of status as to each issue.

Initially, it is alleged that all individual plaintiffs are taxpayers of the Commonwealth of Pennsylvania. Plaintiff Lemon alleges he has paid an admission fee to a Pennsylvania race track. Such fees provide the sole financing of the Education Act. The other individual plaintiffs have not alleged payment of such admission fees.

As to plaintiff Lemon's standing as a taxpayer under the establishment and free exercise clauses of the First Amendment, again we note that the focus is on the party asserting his claim. In this respect, however, "[i]t is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen, supra,* at 103. Although the *Flast* decision concerned itself with the status of a federal taxpayer to challenge a federal spending program under the establishment and free exercise clauses of the First Amendment, we consider that its requirements as to standing apply as well to state taxpayers. *Flast* dictates two requirements for taxpayers standing, namely that: "First the taxpayer must establish a logical nexus between that status and the type of legislative enactment attacked" 392 U. S. at 102, and "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged". 392 U. S. at 102. In *Flast,*

both elements were satisfied since it was alleged that the taxing and spending powers of the federal government were being used in excess of the specific constitutional limitations imposed upon their exercise by the First Amendment. See 392 U. S. at 103. Since the First Amendment applies to State governmental powers, *Cantwell v. Connecticut*, 310 U. S. 296 (1940), the exercise of State taxing and spending is equally limited. These are precisely the allegations made by plaintiff Lemon in the instant case. We, therefore, hold that he has by these allegations demonstrated standing to challenge the Education Act under the establishment and free exercise clauses of the First Amendment.

The other individual plaintiffs assert generally that they are taxpayers in Pennsylvania. However, they have not alleged the payment of any tax which would bring them within the class of affected taxpayers. *Doremus v. Board of Education*, 342 U. S. 429 (1952); *Murdock v. Pennsylvania*, 319 U. S. 108 (1943). Rather, these plaintiffs allege that they have not paid an admission fee to a Pennsylvania race track because to do so would require them to pay tax for the support of religion in violation of their rights of conscience. The personal right to freedom of conscience is protected by the free exercise clause of the First Amendment and the State may not condition other rights or privileges upon the sacrifice of this freedom. See *Sherbert v. Verner*, 374 U. S. 398 (1963); *Torcaso v. Watkins*, 367 U. S. 398 (1961). Although the privilege to attend a race track here asserted and its connection to free exercise is less apparent than in either of the above cited cases, we will recognize it for the purpose of establishing the standing of these plaintiffs.

The remaining question is whether any of the individual plaintiffs have standing to challenge the Education Act on equal protection grounds. It is alleged generally in the complaint that the private schools which have contracted or will contract with the Commonwealth under the Education Act

intentionally discriminate in the selection of students and/or teachers or are de facto segregated by race or religion. It is further alleged that the funds allocated by the Commonwealth to these schools under the Act will be used to perpetuate and support these practices and as such there is State action involved. We will assume for the purpose of deciding this aspect of the standing issue that these alleged facts could be proved at a hearing on the merits. Nevertheless, these plaintiffs lack standing to challenge the Education Act under the equal protection clause of the Fourteenth Amendment.

The Education Act on its face does not use religion or race as a standard or guideline to determine who may enter into a contract with the Commonwealth. As such the Act itself does not purport to make any classifications to deny equal treatment to members of any particular race or religion. As we previously noted, the requirement of standing focuses on the party affected and his personal stake in the outcome of the litigation at issue. Plaintiff Lemon asserts his status as a Negro and parent of a child in a public school in Pennsylvania. However, there is no allegation in the complaint which asserts that Lemon or his child is personally affected by any alleged intentional discrimination or de facto segregation in these schools. There is no allegation that Lemon's child attempted to enroll at any of these schools and was denied admission because of race or religion. None of the other plaintiffs' allegations point to any interest, parental or otherwise, which has been or may be affected by the alleged discriminatory practices. The absence of an allegation that the personal rights of these parties are affected has the net effect of seeking to raise hypothetical grievances of others who *may be* personally injured by such discrimination. Standing requires at least that the plaintiff himself be personally affected. *Flast*, supra, at 110. See also *United Public Workers v. Mitchell*, 330 U. S. 75 (1947).

Race is indeed a relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies or laws where he himself was not the object of such practice.[14] Consequently, as none of the individual plaintiffs have alleged a personal stake in the instant case, they have failed to establish standing under the equal protection clause.

III.

Establishment and Free Exercise.

We consider now the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted. In this posture of the case we accept as true all well-pleaded allegations of fact in the plaintiffs' complaint. The plaintiffs allege as a fact that the purpose and primary effect of the Education Act is to aid religion. For the purpose of considering the motion to dismiss it is argued that the allegation of the purpose and primary effect of the Education Act in the complaint must be deemed admitted. While it is true that well-pleaded facts in the complaint are deemed admitted for the purpose of testing its sufficiency, such an admission does not include legal conclusions drawn from these facts. *Newport News Co. v. Schauffler*, 303 U. S. 54, 57 (1937); *Pauling v. McElroy*, 278 F. 2d 252, 253-254 (D. C. Cir. 1960). We believe that the allegation asserts not a fact but a conclusion of law and as such is not admitted for purposes of testing the sufficiency of the complaint. The question of law then presented is whether the purpose or primary effect of the Pennsylvania

14. *See e.g. Burton v. Wilmington Parking Authority*, 365 U. S. 716 (1961); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F. 2d 959 (4th Cir. 1963) *cert. denied* 376 U. S. 938 (1964); *Deal v. Cincinnati Board of Ed.*, 369 F. 2d 55 (6th Cir.) *cert. denied* 389 U. S. 847 (1966).

Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion.[15]

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This limitation originally placing a restriction only on federal governmental involvement in religion has since been judicially incorporated into the Fourteenth Amendment and now represents a bar on State as well as Federal action. *Cantwell v. Connecticut*, 310 U. S. 296 (1940). The meaning and scope of the First Amendment have been elaborated several times by the decisions of the United States Supreme Court in areas involving education. Most apposite to the instant case are the Supreme Court's decisions in *Everson v. Board of Education*, 330 U. S. 1 (1947) and *Board of Education v. Allen*, 392 U. S. 336 (1968). In *Everson*, the Supreme Court held that a New Jersey statute which authorized State reimbursement to parents for bus fares of children attending both public and parochial schools did not violate the establishment clause of the First Amendment. The Court noted that the establishment clause prohibits the states from setting up a church or supporting the religious activities of sectarian institutions. 330 U. S. at 16. However, the Court further observed that a State may not hamper citizens from receiving the benefits of public welfare legislation by excluding religions from its benefits. *Id.* The First Amendment "requires the State to be neutral in its relations with groups of religious believers and nonbelievers. . . ." 330 U. S. at 18. As bussing was generally in the same category as other government services provided

15. More specifically, with respect to the establishment clause, in paragraph 18 of the complaint it is alleged that the Act (1) "has as its purpose the advancement of religion", and (2) "finances and participates in the blending of sectarian and secular education", (3) "provides for direct financial aid out of State funds to sectarian schools", and (4) "has as its primary effect the advancement of religion".

to parochial schools such as ordinary police and fire protection, sewage disposal, public highways and sidewalks, this measure of aid, as it benefited school children, could be constitutionally extended without breaching the standard of government neutrality toward religion embodied in the First Amendment.

Most recently, in *Board of Education v. Allen*, 392 U. S. 236 (1968) the Court sustained, over First Amendment objections, legislation in New York which required the State to lend textbooks free of charge to all children in private sectarian and nonsectarian school. The Court recognized that "*Everson* and later cases have shown that the line between State neutrality to religion and State support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree'. Zorach v. Clauson, 343 U. S. 306, 314 (1952). See McGowan v. Maryland, 366 U. S. 420 (1961)". *Id.* The Court re-examined its prior decisions and articulated a pragmatic standard, first espoused in *Abington School District v. Schempp*, 374 U. S. 203 (1963), by which to test legislation designed to achieve a public objective through religiously affiliated educational institutions. To distinguish between "forbidden involvement of the State with religion and those contacts which the Establishment Clause permits" the Supreme Court stated:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U. S. at 222.

Although the results of the *Everson* and *Allen* decisions were to provide some measure of indirect aid to parochial schools in that transportation to receive religious instruction was facilitated and that the parochial schools' funds were no longer required to purchase certain books, such results did not constitute a breach of State neutrality towards religion. In applying the purpose and primary effect test to the New York statute in *Allen*, the Supreme Court reasoned that "[t]he express purpose of section 701 was stated by the New York legislature to be furtherance of the educational opportunities avaliable to the young. . . . The law merely makes avaliable to all children the benefits of a general program to lend school books free of charge." 392 U. S. at 243. Although a distinction between bussing and books was recognized, since the latter may be used as a vehicle of religious teaching, the Court noted that the language of the New York statute neither authorized nor permitted loans or distributions of religious literature. Properly, the Court was not willing to assume that New York's administrators would violate the terms of the statute; accordingly, it was held that the principal of neutrality was satisfied and the primary effect of the statute was not to advance religion. See 392 U. S. at 244, 245.

It is here argued that Pennsylvania's Education Act has as its purpose and primary effect the advancement of religion. We believe that the purpose of the Education Act can be found clearly on its face. The Legislature has declared that the purpose of the Education Act is "to promote the welfare of the people of the Commonwealth of Pennsylvania" and to "promote the secular education of children attending nonpublic schools". Support for this declaration of purpose is found in specific legislative findings which point to the percentage of school-age children educated in Pennsylvania's private institutions, the

rising cost of education, increased school population and demands for more qualified teachers and adequate facilities. Furthermore, the Legislature also recognized the potential financial burden on the public treasury and long-range impairment of education which may result if private institutions no longer bear their present educational burdens. The plaintiffs argue that because the vast majority of schools which will contract for the purchase of secular educational services under the Education Act are sectarian schools, the purpose or operative effect of the instant statute must be to support religion. We cannot accept the plaintiffs' argument. "The fact that a State law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a Legislature has erroneously appraised the public need." *Everson v. Board of Education,* 330 U. S. at 6. The purpose of the statute on its face indicates that "[the State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded". 392 U. S. 247. The plaintiffs urge that we re-examine the legislative history of the statute and contend that such an examination will disclose that the true intent of the Pennsylvania legislators was to aid religion. We do not, however, feel that it is necessary or appropriate in the instant case to re-examine the legislative history of the Education Act in search of the "true intent" of Pennsylvania's legislators. The legislative findings of the State are not to be lightly set aside. In this connection, Mr. Justice Frankfurter has observed that:

> [T]he private and unformulated influences which may work upon legislation are not open to judicial probing. "The decisions of this Court from the beginning lend no support whatever to the assumption that the judi-

> ciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." McCray v. United States, 195 U. S. 27, 56. "Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." (Citations omitted) *McGowan v. Maryland,* 366 U. S. at 496.

The education of our nation's children quite properly has been recognized by the Supreme Court as a proper subject of legislation enacted in furtherance of a public interest. *Cochran v. Board of Education,* 281 U. S. 370 (1930). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning; rather, educational goals may effectively be satisfied through private education. *Pierce v. Society of Sisters,* 268 U. S. 510 (1925). As a sensible corollary to the *Pierce* decision and considering the State's interest in satisfying its compusory education laws through private educational institutions, the *Allen* Court observed:

> [I]f the State must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular educational function. 392 U. S. at 236.

We recognize that "private education . . . is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," 392 U. S. at 247, and that the public's reliance on private education suggests that adequate *secular* education is being provided in these schools. We further recognize, as did the Supreme Court in *Allen,* that the "State's interest in education may

be sufficiently served by reliance *on the secular teachings which accompany religious training*'' in nonpublic schools. 392 U. S. at 245. Furthermore, we consider that ''religious schools pursue two goals, religious instruction and secular education'', 392 U. S. at 245, and we believe that the State may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Education Act on its face authorizes the Commonwealth to contract only for services connected with the *strictly secular* function of educating Pennsylvania's school children in the secular subjects of mathematics,[16] physical sciences,[17] modern foreign language,[18] and physical education.[19] That the Commonwealth

16. In the Regulation to the Education Act mathematics is defined as follows:

> 12. "Mathematics" shall mean the science of numbers and their operations, interrelations, combinations, generalizations, and abstractions, and of space configurations and their structure, measurement, transformations, and generalizations. It includes the study of number, space, and structural patterns. Branches of mathematics include arithmetic, algebra, geometry, trigonometry, calculus, analysis, probability, statistics, logic, and number theory.

17. Physical Science is defined as

> 15. "Physical science" is organized knowledge about the physical composition and structure of phenomena and the process of relating quantitative or qualitative description of physical phenomena related to time, space, mass, or derived concepts in a manner that is in agreement with all observed properties of these phenomena. "Physical science" includes the basic sciences of chemistry, physics, astronomy, geology, physical oceanography, and meteorology as well as the areas of specialization derived from these.

18. Modern foreign language does not include the teaching of traditional church related classic languages such as Latin or Greek.

> 13. "Modern Foreign languages" is a term collectively applied to the study of pronunciation, grammar, composition

must not be involved in the religious functions of sectarian educational institutions is clearly established by the nature and kind of strictly secular subjects selected in the statute itself and the controls and restrictions placed upon the statute's operation by the regulations promulgated thereunder. Thus limited and restricted we cannot hold that the statute advances religion either in purpose or primary effect. Moreover, the statute applies to *all* nonpublic schools both sectarian and non-sectarian. As it may apply to sectarian institutions, we concur with the Supreme Court's statement in Allen, supra, that "*we cannot agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." (Emphasis added) 392 U. S. at 248.

Administered within its narrow confines neither the primary nor the necessary operative effect of the statute advances religion. It is quite unlike the situation where State tax-supported public school buildings, facilities and teachers are used as a forum and means for the dissemina-

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and reading of foreign languages in contemporary use, as contrasted with that of the ancient, or "dead", languages commonly called the classics.

19.

14. "Physical education" refers to that part of the school programs which provides guidance and instruction through physical activities designed to meet the needs of pupils in developing their physical efficiency and recreational skills, and, along with other phases of the curriculum, provides maximum opportunity for growth physically, mentally, emotionally, and socially. It includes adaptive physical education for those pupils who, because of health reasons, are unable to participate in regular classes. "Physical education" does not consist of instruction in music, driver education, military training, or extramural or interscholastic athletic and/or sports. Health instruction is not considered physical education.

Physical education does not include sex education or other areas which may be deemed religiously oriented.

tion of religious doctrines at times and on occasions when pupils are subject to the State's compulsory attendance laws. *McCollum v. Board of Education*, 333 U. S. 203 (1948); *Abington School District v. Schempp*, 374 U. S. 203 (1963); *Engel v. Vitale*, 370 U. S. 421 (1962). On the contrary, the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. The statute is further limited and confined to the purchase of services at cost. Unlike *Schempp* and *Engel* the statute here maintains a position of complete *religious* neutrality. In *Zorach v. Clauson*, 343 U. S. 306, the Court approved the State's encouragement of "religious instruction" and its cooperation "with religious authorities."[20] Here the Education Act does not go so far as to encourage the teaching of religious matter. We recognize that the separation of Church and State embodied in the non-establishment principle is not a self-defining concept. The increasing national concern for education in our society, coupled with the public awareness that private schools are performing a significant public service in educating great numbers of school-age children, necessarily makes the State interested in private education. Of necessity therefore:

> As the State's interest in the individual becomes more comprehensive, it's concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Most aim at human good, and in their respective views of what is good for

20. The Court in *Zorach* stated:

> When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . 343 U. S. at 313.

> many they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay. McGowan v. Maryland, 366 U. S. 420, 462 (1966). (Separate opinion of Mr. Justice Frankfurter).

That such a common interest in education exists is desirable if not essential to the continued existence of a free society so long as the State's function is, as here, carefully defined, limited and confined to secular as opposed to sectarian matters. We do not view the First Amendment as requiring an absolute separation between necessarily overlapping interests in the secular education of school-age children. To require such a standard would assume that the State and religion exist in mutually exclusive and sharply defined spheres having no common natural interest in the education of our youth. Such a view would not comport with the extension of even police or fire protection or other governmental services in the public interest.

Nor do we find persuasive the argument that the child must be the direct beneficiary of government funds which support secular education. Such an approach would place form over substance in that a constitutional result would depend upon minute distinctions and technicalities. The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers. In our view the constitutional result should not and cannot wholly depend upon the identity of the payee. The use to which the funds are put must be the primary concern.[21]

The mandate of the First Amendment is neutrality with respect to religious teachings, beliefs and practices.

21. The Supreme Court in *Allen* implicitly recognized this when it noted the secular books on loan under New York's statute were ordered and stored by the parochial schools but were furnished for the *use of individual students*. As such this secular use was in conformity with the Constitution. 392 U. S. at 244 n. 6.

The Education Act does not employ religion as its standard. The prerequisites to receiving government funds for the purchase of secular educational services, we believe, are designed to maintain the neutrality required by the First Amendment. While it may be argued that the consequential result of the instant statute may be to indirectly benefit non-public sectarian schools, the purpose and primary effect of the Education Act is secular in nature and such an incidental benefit is not sufficient to infringe upon the non-establishment principle of the First Amendment. As was noted by Mr. Justice Harlan, concurring in *Board of Education v. Allen,* supra:

> [W]here the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State, and where the activity does not involve the State, 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom . . . it is not forbidden by the religious clauses of the First Amendment. 392 U. S. at 249.

Admittedly, the line is not an easy one to draw. However, we believe the Education Act is consistent with neutrality towards religion and comes within the permissible limits and spirit of the non-establishment principle. Consequently, we will dismiss the plaintiffs' complaint under the establishment clause.

Plaintiffs also allege in their complaint that the Education Act on its face and in its necessary operative effect denies them the free exercise of religion. With respect to each of the plaintiffs, it is alleged that "[i]t is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools." It is also alleged that the Act "constitutes com-

pulsory taxation for the support of religion or religious educational institutions."

With respect to the latter allegation, as we have decided that the Education Act in purpose and primary effect does not advance or support religion, such taxation, assuming arguendo that it is compulsory, is not for the support of religion. Consequently, this allegation must fall. With respect to the former allegation, it is the purpose of the free exercise clause of the First Amendment "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority". *School District of Abington Township v. Schempp,* 374 U. S. 203, 223 (1963). There is no allegation in the plaintiffs' complaint as to what their particular religious beliefs are nor how the Education Act, by authorizing the purchase of secular educational services, coerces them in the practice of their religion. In dismissing the free-exercise allegation in *Board of Education v. Allen, supra,* the Supreme Court stated:

> Appellants also contend that '§ 701 offends the Free Exercise Clause of the First Amendment. However, it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion' Abington School District v. Schempp, 374 U. S. 203, 223 . . . and appellants have not contended that the law in any way coerces them as individuals in the practice of their religion. 392 U. S. at 248.

Since these essential allegations are also lacking in this case plaintiffs have failed to state a claim under the free-exercise of the First Amendment and, therefore, their complaint will be dismissed. In view of our disposition of defendants' motions to dismiss, we need not consider the remaining motions.

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

ORDER.

AND NOW, this 28th day of November, 1969, IT IS ORDERED that:

1. Defendants' motion to dismiss the complaint as to the organizational plaintiffs for lack of standing on all issues raised herein is GRANTED.

2. Defendants' motion to dismiss the complaint as to plaintiff Lemon for lack of standing under the religious clauses of the First Amendment is DENIED.

3. Defendants' motion to dismiss the complaint as to the remaining individual plaintiffs, Priscilla Reardon and Betty J. Worrell, for lack of standing as taxpayers under the establishment is GRANTED.

4. Defendants' motion to dismiss the complaint as to individual plaintiffs Reardon and Worrell for lack of standing under the free-exercise clause is DENIED.

5. Defendants' motion to dismiss the complaint as to all individual plaintiffs for lack of standing under the equal protection clause is GRANTED.

6. Defendants' motion to dismiss the complaint for failure of all plaintiffs to state a claim upon which relief can be granted is GRANTED.

By THE COURT,

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

APPENDIX A TO OPINION AND ORDER.

[See Appendix "A" to Complaint, pp. A18 to A25, *supra.*]

HASTIE, *Chief Circuit Judge,* dissenting.

The basic question we have to decide is whether the Pennsylvania Nonpublic Elementary and Secondary Education Act, No. 109 of June 19, 1968, 24 P. S. § 5601, on its face and construed in the light of certain factual allegations of the present complaint which must be deemed correct on motion to dismiss the complaint, violates the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment.

The Act provides that the state shall pay public funds to applying "nonpublic" elementary and secondary schools to reimburse them for having rendered "secular educational service" through the teaching of certain subjects; namely, mathematics, modern foreign languages, physical science and physical education. Reimbursement to a school is authorized only for the cost of teachers' salaries, textbooks and instructional materials after and to the extent that such costs have actually been incurred by the institution.

The complaint alleges that the great majority of the schools eligible for subsidies under the Act are affiliated with or under the control or direction of churches or are in other respects sectarian schools or schools which teach religion and that the primary purpose as well as the principal effect of the Act is thus to aid religious institutions. For purposes of the present motion the majority opinion properly accepts as factually correct the complaint's allegations as to the religious and sectarian character of most of the schools intended to receive and actually receiving state grants in aid under the Act. However, that opinion characterizes as an allegation of law, and therefore refuse to accept as correct, the allegation that the primary purpose and principal effect of the Act is thus to aid institutions of religion. Instead, the majority seems to view the question of the purpose and effect of the statute as foreclosed by declarations in the statute itself that the legislative purpose

is "to promote the welfare of the people of the Commonwealth" and "to promote the secular education of children attending nonpublic schools". With this I cannot agree.[1] But even if inquiry as to purpose and effect should be confined to examination of the language and scheme of the statute, I cannot avoid the conclusion that the primary purpose and effect of the enactment is to help the nonpublic schools by supplying them with needed financial aid, while whatever promotion of the public welfare is anticipated as a result of such public assistance is at best an incidental consequence claimed in justification of the state's action.

It merits mention at this point that both the statutory text and the majority opinion make much of the concept that the state "contracts to purchase secular educational services". Actually, this phrase is not descriptive of the statutory scheme. A nonpublic school that desires financial aid under the Act need do no more than submit, on a form prescribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called "contract". The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure in asking for aid and later proving that it has made expenditures that are reimbursable under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none. The artificial characterization of this

1. This is not a disposition on summary judgment where the factual posture of the case is established by affidavits and exhibits. Here decision is controlled by the allegations of the complaint and our judgment as to the potentiality of proof thereunder.

rocedure as "contracting for secular educational services" oes not help solve our constitutional problem.

Certainly the Establishment Clause of the First Amendent does not preclude the state from providing any assistance, no matter how indirect, to religious institutions. s the majority opinion correctly indicates, religion's interest and the state's interest in the public good necessarily verlap. In contemporary experience churches and other eligious institutions characteristically, and to their great redit, conceive their mission and undertake their ministry hrough various social means additional to the fundament f worship. The providing of shelter and care for the needy nd aged, education for youth, and other social services for he community are all deemed an important part of organzed church work. Yet, in the modern welfare state, similar ctivities have long since won recognition as important overnmental functions and responsibilities, from the performance and discharge of which religious institutions with ike undertakings may derive incidental benefits. Thus, where the state has supplied all school children with transportation and books, sectarian educational enterprises are ndirectly aided by being relieved of a financial burden which they might otherwise feel obligated to bear. In *Everson v. Board of Education*, 1947, 330 U. S. 1, and *Board of Education v. Allen*, 1968, 392 U. S. 236, the Supreme Court recognized that the Constitution does not preclude a state from thus providing public services directly to its people merely because such services incidently aid religious institutions. However, these cases do not suggest that the Constitution permits direct public financing of a religious enterprise merely because such aid also benefits the state.

It is unrealistic to view the present statute as merely subsidizing secular instruction and thus only incidentally benefiting religious institutions by releasing their funds for religious purposes. The primary purpose for which sec-

tarian schools formulate and offer a comprehensive curriculum apart from the public school system is religious. Through a total educational program offered in a separate religious environment, sectarian schools serve to inculcate and reinforce in children doctrine and moral precepts derived from the tenets of the church. It is not necessary to inquire whether, for the fulfillment of this primary religious purpose every course is taught with religious overtones. The crucial consideration is that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives. When the state reimburses a sectarian school for any part of the curricular costs of such a teaching program it directly finances and supports a religious enterprise. Constitutionally, such subsidizing of a religious enterprise is not essentially different from a payment of public funds into the treasury of a church. Such a prohibited involvement of the state in a religious undertaking is not validated merely because the religious enterprise itself incidentally relieves the state of the cost of educating many children.

Even more important than the foregoing analytical distinction are the constitutionally significant consequential distinctions between the present statute and those considered in the *Everson* and *Allen cases*. The statute in this case, much more than those in *Everson* and *Allen*, invites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions.

It has already been pointed out that sectarian schools are only part of the complex of activities, many of them as "secular" as the teaching of languages and physical science, which modern churches and religious institutions finance and conduct. Charities, hospitals, community centers and homes for the aged and infirm are familiar examples. The theory that would validate Act No. 109 also unavoidably

validates state subsidies for all such enterprises of religious organizations, as well as subsidies for all of the "secular" parts of sectarian education not included in the present statute. If the Constitutional bar to state grants in all such cases should be removed, it is reasonable to anticipate continuing political controversy in every state and local community whether and to what extent public funds are to be granted to subsidize a large number and a broad range of activities of religious organizations. Leaders and devout members of various organized religious groups will see it as their duty to their church or sect to seek such aid and to insist that state and local government contribute liberally to their sectarian enterprises. Legislators, government executives and candidates for elective office in whose judgment other claims upon the public purse merit higher priority can anticipate political opposition as enemies of the faith. In this way religion and politics will become *in pari materia.*

So far we have escaped much of the divisiveness and antagonism of political differences and controversies about religious matters because public financing of activities of religious organizations has been understood to be prohibited by our Constitution. Professor Paul Freund has perceptively pointed out that President Kennedy was able to avoid taking a political position upon issues of religious character by relying upon authoritative decisions on the Constitutional separation of state and religion as controlling. Freund, *Public Aid to Parochial Schools*, 1969, 82 HARV. L. REV. 1680, 1692. But if the present statute is held to be Constitutional, I see no escape from the evils that attend a widespread and pervasive intermingling of politics and religion.

The other side of the coin is the inevitablity of state intrusion into the affairs of organized religion in the administration of the present statute. As already stated, it is

the justifying imperative of most, if not all, church sponsored and controlled education that formal education shall serve to inculcate and reinforce in youthful minds sectarian doctrine and moral precepts derived from the tenets of the church.[2] In schools with such a mission it is appropriate, practically unavoidable, that admission policies and practices reflect a preferance for enrollment of children of the sponsoring faith, though not necessarily excluding all others. Yet, once the state joins in financing such education, the mandated equalitarian position of the state must result in state imposition of strictly non-discriminatory admission standards consistent with public duty,[3] whatever sacrifice of appropriate religious objectives may result. I cannot square such state intrusion into religious affairs with the concept of separation of church and state which the First Amendment implements.

The same is true in the matter of curriculum. If the state is to finance "secular" teaching in parochial and other church related schools, the state must have the power and responsibility of monitoring curriculum and instruction to assure that teaching in these state supported areas is not so oriented as to inculcate sectarian or religious tenets or doctrines. Indeed, Act No. 109 expressly provides for

2. See L. Pfeffer, Church, State, and Freedom, 1953, 290-300; See also Rev. S. Woywood, The New Canon Law, under imprimatur of Most Rev. Francis Spellman, Archbishop of New York, and others (1940), quoted in *Everson v. Board of Education*, 330 U. S. 1, 18, 22-23 (Jackson, J., dissenting).

3. *Cf. Evans v. Newton*, 1966, 382 U. S. 296; *Burton v. Wilmington Parking Authority*, 1961, 365 U. S. 715; *Cooper v. Aaron*, 1958, 358 U. S. 1, 16-19; *Pennsylvania v. Board of Directors of City Trusts*, 1957, 353 U. S. 230; *Kerr v. Enoch Pratt Free Library*, 4th Cir. 1945, 149 F. 2d 212.

It is difficult to see how the provision of the Pennsylvania Fair Educational Opportunities Act that sanctions religious discrimination in admission policies and practices of sectarian schools could validly be applied to sectarian schools that receive public financing under Act No. 109. 24 P. S. § 5004(c).

state approval of text books and teaching materials in all subsidized schools. The substantiality of this involvement is indicated by Mr. Justice Douglas in the course of his dissent in *Board of Education v. Allen,* 392 U. S. 236, 258-62, where he elaborates numbers of instructive examples of sectarian orientation in teaching materials appropriately used in the teaching of "secular" subjects in church related schools. The extent to which religious orientation of secular subjects will become an appropriate subject of state inquiry is also suggested by interrogatories which the plaintiffs in this suit have addressed to the defendant schools. For example, the church related schools have been asked to disclose the extent to which sectarian precepts are involved in the teaching of secular subjects; whether teachers of such subjects are clerics, and what religious materials and symbols are used or displayed in the schools in connection with activities other than religious ceremonies. It is difficult to imagine a type of intrusion by the state more offensive to a religious community than such pervasive monitoring and investigation of instruction and academic organization in order to purge the secular areas of the curriculum of religious orientation. Yet, it is to just such intrusion that the Pennsylvania statute opens the door, if by necessary implication it does not go farther and mandate the entry of state overseers as the only means by which the state can adequately check upon the initial and continuing eligibility of particular "secular" instruction for state financing.[4]

Mr. Justice Goldberg, in *Abington v. Schemp,* 1963, 374 U. S. 203, 248 and Mr. Justice Harlan, in *Board of Education v. Allen,* 392 U. S. 236, 249, have both expressed what I believe to be a sound rationalization that the First Amend-

4. Act No. 109 explicitly restricts state aid to courses which "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect".

ment is violated by state action which will "involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude". I am unable to avoid the conclusion that the state undertaking authorized by Act No. 109 would thus intolerably involve the state in the realm of the sectarian.

It must also be considered that some of the schools eligible for aid under Act No. 109 appear to be non-sectarian private schools which do not include religious training in their educational programs. Obviously, the First Amendment does not debar state aid to such schools. However, the plaintiffs allege and seek to prove statistically that only a very small minority of the eligible schools are of this character and that this fact and the legislative history of the statute combine to show that the primary purpose and effect of the legislation is to aid sectarian schools. I think the plaintiffs should be permitted to show, if they can, that the inclusion of non-sectarian private schools as institutions eligible for state aid is so minor and incidental an aspect of the statutory scheme that it cannot validate the enactment.

It remains to consider the claim that subsidizing the defendant non public schools as authorized by the statute would deny the plaintiffs the equal protection of the laws. I agree with the majority that the organization plaintiffs lack standing to challenge the legislative scheme under either the First Amendment or the Equal Protection Clause. I also agree that no individual plaintiff alleges that any discrimination practiced by any of the defendant schools affects him or his children in a way that would give him standing to litigate the equal protection issue.

Finally, while I agree with the majority that plaintiff Lemon does and the other individual plaintiffs do not have standing to litigate the alleged violation of the Establish-

ment Clause on the basis of the requirements enunciated by the Supreme Court in *Flast v. Cohen,* 1967, 392 U. S. 83, my reasoning is somewhat different and leads to the conclusion that, except for Lemon, the individual plaintiffs lack standing under the Free Exercise Clause even more clearly than under the Establishment Clause.

In *Flast v. Cohen,* federal income taxpayers alleged that the expenditure of federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction in sectarian schools and to purchase educational materials for use in such schools violated the religion clauses of the First Amendment. The taxpayers' bill for a declaratory judgment and an injunction was dismissed by a three-judge district court for lack of standing. The Supreme Court reversed, holding that the plaintiffs had satisfied the requirements of a logical connection between their status as taxpayers and both "the type of legislative enactment attacked" and "the precise nature of the constitutional infringement alleged". 392 U. S. at 102. The Supreme Court relied principally on its finding that the Establishment Clause was designed to limit the taxing and spending powers of Congress and specifically declined to decide whether the taxpayers' free exercise claim alone would confer standing. 392 U. S. at 104 n. 25

In this case, the ultimate source of funds for the challenged payments under Act No. 109, and the only source, is the admission tax on harness races, 15 P. S. § 2606 (1967), and on thoroughbred races, 15 P. S. § 2656 (Supp. 1969). Plaintiff Lemon alleges that he has paid an admission fee to a harness race, including the tax. All three individual plaintiffs allege that "[i]t is against [their] religious conscience to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools". The majority opinion apparently construes the latter allegation to mean that, except for Lemon, the individual plaintiffs have refrained from attend-

ing the races because to do so would require them to support parochial education. However, the complaint contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues to the purposes of Act No. 109, and none of the individual plaintiffs has alleged any particular religions belief or any effect of Act No. 109 on the practice of a particular religion.

The individual plaintiffs other than Lemon can only be considered "taxpayers" within the scope of the standing requirements of *Flast v. Cohen,* if their "tax money is being extracted and spent in violation of specific constitutional protections. . . ." 392 U. S. at 106. The plaintiffs who have not attended horse races have not alleged that their "tax money is being extracted" by Act No. 109 unless by virtue of a theoretical increase in general tax requirements that might result from the failure to allocate racing revenues to general expenses. However, *Flast v. Cohen* pointed out that where a challenged tax operates "upon a particular class of taxpayers . . . the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class". 392 U. S. at 104 n. 25. Although the Supreme Court was referring to taxpayer standing under the Free Exercise Clause in the quoted dictum, the required nexus between taxpayer status and "the type of legislative enactment attacked", 392 U. S. at 102, also depends on actual or threatened liability for a tax in a challenge under the Establishment Clause. In order to have "the requisite personal stake in the outcome", 392 U. S. at 101, the plaintiffs should have an established monetary interest in the relief sought, rather than an interest that will be realized only if judicial action enjoining expenditures supported by a particular tax program to which plaintiffs are not subject

shall result in a decrease in general tax burdens. Therefore, the individual plaintiffs other than Lemon do not have taxpayer standing to challenge Act No. 109 under either of the religious clauses because they do not contribute revenues disbursed under the Act, and are not "taxpayers within the affected class".

On the other hand, such a taxpayer as plaintiff Lemon, who is subject to the tax program that supports the particular statutory scheme sought to be enjoined, "may or may not have the requisite personal stake in the outcome. . . ." 392 U. S. at 101. Focusing upon the nexus between Lemon's status as a taxpayer and "the precise nature of the constitutional infringement alleged", 392 U. S. at 102, Lemon does complain that he has been required to contribute in support of an establishment. Although Lemon was not compelled to attend a harness race, he has been constrained by the state government to pay a tax on his attendance, a tax that is specifically earmarked by statute for purposes that allegedly support an establishment of religion. In view of the primary function of the Establishment Clause in restraining taxation and disbursement in support of religion, the tax Lemon has paid possesses a sufficient connection to the challenged expenditures under Act No. 109 and to the alleged Constitutional infirmity of the Act to lend the requisite specificity and adverseness to his claim. Accordingly, I conclude that plaintiff Lemon has standing to attack the validity of the legislation under the Establishment Clause.

As to all plaintiffs I would dismiss so much of the claim as alleges a violation of the equal protection clause because of lack of standing to sue. However, in my view, the allegations of the complaint disclose a legislative scheme violative of the Establishment Clause of the First Amendment, as to which plaintiff Lemon alone shows standing to

complain. As to Lemon's First Amendment claim, the motion to dismiss should be denied.

WILLIAM H. HASTIE,
Chief Judge, Court of Appeals
for the Third Circuit.

Supreme Court of the United States

No. 1189 ---- , *October Term, 19* 69

Alton J. Lemon, et al.,

Appellants,

v.

David H. Kurtzman, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.

APPEAL from the United States District Court for the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

April 20, 1970

Mr. Justice Marshall took no part in the consideration or decision of this order.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, ET AL., *Appellants*,

v.

JOAN DiCENSO, ET AL., *Appellees*.

No. 570

WILLIAM P. ROBINSON, JR., ET AL., *Appellants*,

v.

JOAN DiCENSO, ET AL., *Appellees*.

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APPENDIX

Relevant Docket Entries

1969

December 16—Complaint filed together with appearance of Milton Stanzler, Esq., for plaintiffs.

December 23—Designation by Chief Judge Bailey Aldrich of the Honorable Frank M. Coffin, United States Circuit Judge for the First Circuit and the Honorable Hugh H. Bownes, United States District Judge for the District of New Hampshire, to sit with the Honorable Raymond J. Pettine, United States District Judge for the District of Rhode Island received and filed.

1970

January 5—Answer filed.

January 5—Defendants' Motion to Dismiss filed.

January 21—Hearing of Request for Temporary Restraining Order by plaintiffs. Allan M. Shine, Esq., appearance for plaintiffs filed. W. Slater Allen, Jr., Esq., argues against Restraining Order. Mr. Shine argues for. Mr. Shine to file memo in answer to memo of Mr. Allen. Conference to be held in chambers prior to February 1, 1970. Passed. Temporary Restraining Order not to be issued at this time. Affidavit of Helen King read by court.

February 9—Hearing on Motion for Temporary Restraining Order. Mr. Shine argues. Mr. Allen argues. Two defendants' exhibits. Written ruling by Friday. Mr. Shine to answer defendants' memorandum by Wednesday, should he decide to answer it. Order to be entered allowing Richard P. McMahon, Esq., to intervene.

February 11—Motion to Intervene as defendants filed.

February 11—Order [allowing intervention] entered and filed.

February 11—Answer of the Intervenor-Defendants filed.

February 13—Opinion filed.

February 18—Temporary Restraining Order entered and filed.

March 4—Answer to Amended Complaint filed by Defendants Robinson, Hawksley and Hill.

March 4—Motion to Dismiss filed by defendants.

March 11—Answer of the Intervenor-Defendants to Amended Complaint filed.

March 11—Order filed granting Plaintiffs' Motion to Amend Complaint.

March 18—Case goes to trial. Judges Frank M. Coffin, Hugh M. Bownes, and Raymond J. Pettine. Appearance of Leo Pfeffer, Esq., for plaintiffs filed. W. Slater Allen, Esq., for State officials. Jeremiah C. Collins, Esq.. for defendant-intervenors. Mr. Allen makes Defendants' Motion to Dismiss. Mr. Pfeffer argues in opposition. Decision reserved. Mr. Stanzler presents certain stipulations. One plaintiffs' witness. Five defendants' witnesses. Twenty-six plaintiffs' exhibits. Two stipulations entered as defendants' exhibits: stipulation "A", plaintiffs' stipulation; stipulation "B", intervenors.

March 19—Transcript of proceedings on March 17, 1970, filed by court reporter.

March 19—Trial continues. Summation by Mr. Collins for intervenor-defendants. Summation by Mr. Allen for defendants. Summation for plaintiffs by Mr. Pfeffer. Briefs to be submitted by April 6, 1970. Amicus curiae to submit brief. Appearance of Franklin C. Salisbury, Esq., as amicus curiae filed.

March 20—Transcript of proceedings on March 19, 1970, filed by court reporter.

March 20—Order entered and filed vacating the Temporary Restraining Order heretofore entered in this action, etc.

June 15—Opinion filed by Judge Coffin and Judge Bownes.

June 15—Opinion filed by Judge Pettine concurring in result, concurring in part and dissenting in part with the Opinion of the Court.

June 17—Judgment and Order entered and filed denying defendants' Motion to Dismiss; declaring R.I. Public Law C.246 (1969) to be unconstitutional, etc. and permanently enjoining defendants and their agents from making any payments or disbursements under R.I. Public Law C.246 (1969) to teachers employed by denominational schools.

June 17—Defendants' Application for Stay filed.

June 17—Order entered and filed denying Application for Stay.

June 22—Transcript of hearing on June 17, 1970, filed by court reporter.

June 26—Erratum on Opinion of June 15, 1970, filed.

June 26—Notice of Appeal to the Supreme Court of the United States filed by intervenor-defendants.

June 26—Notice of Appeal to the Supreme Court of the United States filed by defendants.

June 26—Record on Appeal together with certified copy of docket entries mailed to Clerk, Supreme Court of the United States, Washington, D. C.

July 1—Certified copy of Order granting a stay pending the timely filing of an apeal, etc., received from Supreme Court of the United States and filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C. A. 4239

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, AND MARIE FRIEDEL, *Plaintiffs.*

v.

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island, *Defendants.*

Complaint

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the Plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the State of Rhode Island for the support of, or to finance, in whole or in part, (a) sectarian schools and (b) any private schools including sectarian schools whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of religion, and to declare such use of funds as violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U.S. Code, Sections 1331, 2281, 2284, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand ($10,000.00) Dollars, as more fully appears hereinafter.

4. Each of the Plaintiffs is a citizen and taxpayer in the United States and in the State of Rhode Island and is a resident in the District of Rhode Island.

5. Defendant William P. Robinson, Jr., is a Commissioner of Education of the State of Rhode Island and is sued herein in that capacity. Defendant Raymond H. Hawksley is General Treasurer of the State of Rhode Island and is sued herein in that capacity. Defendant Charles W. Hill is Controller of the State of Rhode Island and is sued herein in that capacity.

II. Factual Allegations

6. On May 16, 1969, the Governor of the State of Rhode Island approved H.1765 A, being Chapter 246 of the Public Laws of the State of Rhode Island (1969) and entitled "An Act providing salary supplements to non-public school teachers and in amendment of and in addition to Title 16 of the General Laws entitled 'Education', as amended." The Act became effective on July 1, 1969, and is hereinafter referred to as the "Act".

7. The Act, *inter alia*, purports to authorize payment by the State of Rhode Island of a salary supplement to specified teachers in non-public schools in an amount equal to 15% of such teachers' salary, upon the terms and conditions set forth therein, and authorizes the Defendant Commissioner of Education of the State of Rhode Island to promulgate regulations for the purpose of carrying out said Act.

8. Said Act appropriated out of funds in the General Treasury of the State of Rhode Island the sum of Three Hundred Seventy-Five Thousand ($375,000.00) Dollars for the purpose of carrying out the provisions of said Act and authorized Defendant Controller of the State of Rhode Island, to draw orders upon the General Treasurer of the State of Rhode Island, for the payment of such sums as purportedly authorized to be paid by the Act.

9. During the 1969 Session of the Rhode Island Assembly, numerous spokesmen for at least one religious body and

organizations associated with at least one religious body strongly and publicly called for and supported legislation giving state financial assistance to church-operated schools.

10. The Act will primarily benefit parochial elementary schools in Rhode Island because approximately 96 per cent of the non-public elementary school students in this State are enrolled in Roman Catholic parochial schools alone.

11. The terms, conditions and requirements for eligibility for payment of such salary supplements under the Act are such that substantially all payments which are payable as salary supplements will be made to teachers in religious-oriented schools and that by and large no non-religious private schools in Rhode Island are eligible for such salary supplement payments to their teachers.

12. The Act on its face authorizes payments which support sectarian educational institutions, which (a) are controlled by churches or religious organizations, (b) have as their purpose the teaching, propagation and promotion of a particular religious faith and (c) conduct their operations, curricula and programs to fulfill that purpose.

13. The Act does not prohibit in those schools or classes for which aid is provided the existing practice of the wearing of religious garb by teachers, the use of religious symbols in classrooms and in halls and the encouragement of prayers or other religious observances. The regulations adopted by the Commissioner of Education do not in any manner whatsoever prohibit any of the foregoing conduct.

14. The education and the educational process in parochial and diocesan schools is conducted in an atmosphere conducive to the promotion of religious tenets and doctrine, in which it is impossible to separate secular from sectarian in both subject matter and method of instruction.

15. Said Act contains a legislative finding and declaration of policy that it is intended to "assist non-public schools".

16. Subsequent to the approval of the Act by the Governor of the State of Rhode Island, the Defendant Commissioner of Education of the State of Rhode Island, enacted and adopted regulations governing payment of salary supplements to non-public school teachers, which regulations provided, *inter alia,* that "an eligible teacher desiring to apply for salary supplement shall apply annually in the month of September upon forms prescribed by the Commissioner of Education."

17. As of December 10, 1969, approximately two hundred (200) teachers had applied to the Commissioner of Education for a salary supplement under said Act and upon information and belief, approximately all of said applicants teach at religious-oriented schools.

18. The Act authorizes payments to non-public schools whose policies and practices, by purpose or effect exclude or otherwise discriminate against students, teachers or administrators in enrollment or employment by reason of religion.

19. Unless enjoined by this Court, the Defendants will approve and make payments of the aforedescribed salary supplements as authorized by said regulations, which direct that salary supplements be paid in the months of February and June, and such said Defendants in the future will continue to pay large sums of public funds to effectuate the Act.

III. Causes of Action

20. *First Count:* The Act on its face and as applied is a law respecting an establishment of religion in violation of the First Amendment to the United States Constitution

as made applicable to the States by the Fourteenth Amendment in that it (a) provides for direct financial aid out of state funds which support sectarian schools, (b) finances and participates in the blending of sectarian and secular instruction, (c) has as its purpose the advancement of religion, and (d) has as its primary effect the advancement of religion.

21. *Second Count:* The Act on its face and as applied prohibits the free exercise of religion on the part of the individual Plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious educational institutions.

IV. Other Allegations

22. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

23. The Plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

24. The Plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare the Act unconstitutional.

(2) That the defendants be enjoined permanently from approving payment of any funds purportedly authorized under the Act and be permanently enjoined from making any payments purportedly authorized under the Act.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

By their attorneys,

/s/ William J. Sheehan,
William J. Sheehan, Esq.
530 Hospital Trust Building
Providence, Rhode Island 02903

/s/ Benjamin A. Smith,
Benjamin A. Smith, Esq.
314 Howard Building
Providence, Rhode Island 02903

/s/ Harold E. Adams, Jr.,
Harold E. Adams, Jr., Esq.
302 Union Trust Building
Providence, Rhode Island 02903

/s/ Milton Stanzler,
Milton Stanzler, Esq.
626 Industrial Bank Building
Providence, Rhode Island 02903

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Answer of Defendants William P. Robinson, Jr., Commissioner of Education of the State of Rhode Island, Raymond H. Hawksley, General Treasurer of the State of Rhode Island, and Charles W. Hill, Controller of the State of Rhode Island.

Now come the Defendants in the above entitled matter and answer as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks subject matter jurisdiction of the within complaint as the Plaintiffs have no standing to maintain this action.

THIRD DEFENSE

The Court lacks jurisdiction of the within matter as the amount of controversy is less than $10,000.00.

FOURTH DEFENSE

The Defendants deny that the complaint states facts under which the Court could properly form a Rule 23 class.

FIFTH DEFENSE

1. The Defendants admit the allegations contained in paragraphs 5, 6, 8, 16, 17 and 19 of the Complaint.

2. Defendants deny the allegations contained in Paragraph 2, 3, 11, 12, 14, 20, 21 and 22 of the Complaint.

3. The Defendants have insufficient information on which to form a belief as to the truth of the allegations contained in paragraphs 4 and 9 of the complaint and so therefore

neither admit nor deny the same but leave the Plaintiffs to their proof.

4. Defendants answer the allegation in paragraph 7 of the complaint by alleging that the act purports to pay teachers as alleged except that the Defendants are unable to respond to the word "specified" contained in said paragraph and further allege that the act speaks for itself.

5. The Defendant answers the allegations contained in paragraph 13 of the complaint by alleging that the act speaks for itself.

6. Defendants answer paragraph 18 of the complaint by alleging that the act authorizes payments to teachers, and denies that the act authorizes payments to schools.

7. Defendants answer paragraph 1 and 23 of the Complaint by alleging that these plaintiffs state legal conclusions and require no answer.

The Defendants admit that more than 90% of the non-public elementary school students in this State are enrolled in Roman Catholic Parochial Schools; the Defendants have insufficient information to form a belief as to the truth of the allegations of paragraph 10 of the complaint that 96% are so enrolled, and leave the Plaintiffs to their proof. The Defendants deny the conclusary allegations of Paragraph 10, in that such allegations, if true, are neither relevant nor pertinent.

WHEREFORE the Defendants pray that the within complaint be denied and dismissed and that the Defendants have the costs of the action.

William P. Robinson, Jr. et als.
by their attorney

Herbert F. DeSimone
Attorney General

/s/ W. SLATER ALLEN, JR.
W. Slater Allen, Jr.
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Order

This matter came on for consideration at this term upon the motion of John R. Earley, William A. Hanson, Madelyn Law, Ralph F. McElroy, Alan E. Moss, Frank J. Shealey, Phyllis A. Walter, Margaret-Mary Cummiskey, and Cornelius A. Cummiskey for leave to intervene in this matter and upon consideration thereof it appearing that the proposed intervenors meet the requirements of Rule 24 of the Federal Rules of Civil Procedure and it further appearing to the Court that all parties consent thereto, it is by the Court this 11th day of February, 1970,

ORDERED that the motion of John R. Earley, William A. Hanson, Madelyn Law, Ralph F. McElroy, Alan E. Moss, Frank J. Shealey, Phyllis A. Walter, Margaret-Mary Cummiskey and Cornelius A. Cummiskey are hereby given leave to intervene in this matter and are hereby made parties thereto, and the clerk is hereby directed to file the answer attached to motion in the same manner and with

like effect as if intervenors had been made original parties to this action.

RAYMOND J. PETTINE
United States District Judge
Feb. 11/70

Assented To

/s/ ALLAN M. SHINE
Allan M. Shine, Esquire
Winograd, Winograd & Marcus
915 Hospital Trust Building
Providence, Rhode Island
Attorney for Plaintiffs and on behalf
of all other counsel for Plaintiffs.

/s/ W. SLATER ALLEN, JR.
W. Slater Allen, Jr., Esquire
Assistant Attorney General for the
State of Rhode Island
411 County Courthouse
Providence, Rhode Island
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Answer of Intervenor-Defendants

First Defense

Plaintiffs' complaint fails to state a claim upon which relief can be granted.

Second Defense

The relief sought by the plaintiffs would infringe upon the free exercise of the religion of those intervenors who are the parents of children enrolled in Roman Catholic non-public schools in Rhode Island, as well as the free exercise of the religion of their children, and thereby deny those intervenors, their children, and the class that those intervenors represent the rights secured to them by the First Amendment of the United States Constitution.

Third Defense

The relief sought by the plaintiffs would constitute an impermissible classification based upon religious ground and would thereby deny to those intervenors who are teachers and to the class they represent the equal protection of the laws secured to them by the Due Process Clause of the Fifth Amendment of the United States Constitution.

Fourth Defense

First: Intervenors admit that Paragraph 1 of the complaint sets forth plaintiffs' description of their legal claims, and as such, requires no response.

Second: Intervenors admit the allegations of Paragraph 2 of the complaint.

Third: Intervenors admit the allegations of Paragraph 3 of the complaint.

FOURTH: Intervenors allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the complaint, and intervenors demand strict proof thereof.

FIFTH: Intervenors admit the allegations contained in Paragraph 5 of the complaint.

SIXTH: Intervenors admit the allegations contained in Paragraph 6 of the complaint.

SEVENTH: Intervenors answer the allegations of Paragraphs 7 and 8 of the complaint by alleging that the statute in question speaks for itself.

EIGHTH: Intervenors allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the complaint and intervenors demand strict proof thereof.

NINTH: Intervenors deny the allegations contained in Paragraph 10 of the complaint.

TENTH: Intervenors deny the allegations contained in Paragraph 11 of the complaint.

ELEVENTH: Intervenors deny the allegations contained in Paragraph 12 of the complaint.

TWELFTH: Intervenors answer the allegations of Paragraph 13 of the complaint by alleging that the statute in question speaks for itself.

THIRTEENTH: Intervenors deny the allegations contained in Paragraph 14 of the complaint.

FOURTEENTH: Intervenors deny the allegations contained in Paragraph 15 of the complaint.

FIFTEENTH: Intervenors admit the allegations contained in Paragraph 16 of the complaint.

SIXTEENTH: Intervenors allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the complaint and intervenors demand strict proof thereof.

SEVENTEENTH: Intervenors deny the allegations contained in Paragraph 18 of the complaint.

EIGHTEENTH: Intervenors admit the allegations in Paragraph 19 of the complaint.

NINETEENTH: Intervenors deny the allegations contained in Paragraphs 20 and 21 of the complaint.

TWENTIETH: Intervenors admit the allegations contained in Paragraph 22 of the complaint.

TWENTY-FIRST: Intervenors deny the allegations contained in Paragraph 23 of the complaint.

WHEREFORE, intervenors demand judgment dismissing the complaint and providing for all appropriate relief.

By their attorneys,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Amended Complaint

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the Plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the State of Rhode Island for the support of, or to finance, in whole or in part, (a) sectarian schools and (b) any private schools including sectarian schools whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of religion, and to declare such use of funds as violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U.S. Code, Sections 1331, 1343, 2281, 2284, 2201 and 2202, and Title 42, U.S. Code, Section 1983 *et seq.*

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand ($10,000.00) Dollars, as more fully appears hereinafter.

4. Each of the Plaintiffs is a citizen and taxpayer in the United States and in the State of Rhode Island and is a resident and qualified legal voter in the State of Rhode Island. Plaintiffs Donald R. Hill and Alice Chase are parents of children regularly registered in and attending the elementary or secondary grades in the public schools of Rhode Island.

5. Defendant William P. Robinson, Jr., is Commissioner of Education of the State of Rhode Island and is sued herein in that capacity. Defendant Raymond H. Hawksley is General Treasurer of the State of Rhode Island and is

sued herein in that capacity. Defendant Charles W. Hill is Controller of the State of Rhode Island and is sued herein in that capacity.

II. Factual Allegations

6. On May 16, 1969, the Governor of the State of Rhode Island approved H. 1765 A, being Chapter 246 of the Public Laws of the State of Rhode Island (1969) and entitled "An Act providing salary supplements to non-public school teachers and in amendment of and in addition to Title 16 of the General Laws entitled 'Education', as amended." The Act became effective on July 1, 1969, and is hereinafter referred to as the "Act."

7. The Act, *inter alia,* purports to authorize payment by the State of Rhode Island of a salary supplement to specified teachers in non-public schools in an amount equal to 15% of such teachers' salary, upon the terms and conditions set forth therein, and authorizes the Defendant Commissioner of Education of the State of Rhode Island to promulgate regulations for the purpose of carrying out said Act.

8. Said Act appropriated out of funds in the General Treasury of the State of Rhode Island the sum of Three Hundred Seventy-Five Thousand ($375,000.00) Dollars for the purpose of carrying out the provisions of said Act and authorized Defendant Controller of the State of Rhode Island, to draw orders upon the General Treasurer of the State of Rhode Island, for the payment of such sums as purportedly authorized to be paid by the Act.

9. During the 1969 Session of the Rhode Island Assembly, numerous spokesmen for at least one religious body and organizations associated with at least one religious body strongly and publicly called for and supported legislation giving state financial assistance to church-operated schools.

10. The Act will primarily benefit parochial elementary schools in Rhode Island because approximately 96 per cent

of the non-public elementary school students in this State are enrolled in Roman Catholic parochial schools alone.

11. The terms, conditions and requirements for eligibility for payment of such salary supplements under the Act are such that substantially all payments which are payable as salary supplements will be made to teachers in religious-oriented schools and that by and large no non-religious private schools in Rhode Island are eligible for such salary supplement payments to their teachers.

12. The Act on its face authorizes payments which support sectarian educational institutions, which (a) are controlled by churches or religious organizations, (b) have as their purpose the teaching, propagation and promotion of a particular religious faith and (c) conduct their operations, curricula and programs to fulfill that purpose.

13. The Act does not prohibit in those schools or classes for which aid is provided the existing practice of the wearing of religious garb by teachers, the use of religious symbols in classrooms and in halls and the encouragement of prayers or other religious observances. The regulations adopted by the Commissioner of Education do not in any manner whatsoever prohibit any of the foregoing conduct.

14. The education and the educational process in parochial and diocesan schools is conducted in an atmosphere conducive to the promotion of religious tenets and doctrine, in which it is impossible to separate secular from sectarian in both subject matter and method of instruction.

15. Said Act contains a legislative finding and declaration of policy that it is intended to "assist non-public schools".

16. Subsequent to the approval of the Act by the Governor of the State of Rhode Island, the Defendant Commissioner of Education of the State of Rhode Island, enacted and adopted regulations governing payment of salary supplements to non-public school teachers, which

regulations provided, *inter alia,* that "an eligible teacher desiring to apply for salary supplement shall apply annually in the month of September upon forms prescribed by the Commissioner of Education."

17. As of December 10, 1969, approximately two hundred (200) teachers had applied to the Commissioner of Education for a salary supplement under said Act and upon information and belief, all of said applicants teach at religious-oriented schools.

18. The Act authorizes payments which support non-public schools whose policies and practices, by purpose or effect exclude or otherwise discriminate against students, teachers or administrators in enrollment or employment by reason of religion.

19. Unless enjoined by this Court, the Defendants will approve and make payments of the aforedescribed salary supplements as authorized by said regulations, which direct that salary supplements be paid in the months of February and June, and such said Defendants in the future will continue to pay large sums of public funds to effectuate the Act.

III. Causes of Action

20. *First Count:* The Act on its face and as applied is a law respecting an establishment of religion in violation of the First Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment in that it (a) provides for direct financial aid out of state funds which support sectarian schools, (b) finances and participates in the blending of sectarian and secular instruction, (c) has as its purpose the advancement of religion, and (d) has as its primary effect the advancement of religion.

21. *Second Count:* The Act on its face and as applied prohibits the free exercise of religion on the part of the

individual Plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious educational institutions.

IV. Other Allegations

22. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

23. The Plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

24. The Plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare the Act unconstitutional.

(2) That the defendants be enjoined permanently from approving payment of any funds purportedly authorized under the Act and be permanently enjoined from making any payments purportedly authorized under the Act.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

By their attorneys,

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915 Hospital Trust Building
Providence, Rhode Island 02903

Milton Stanzler, Esq.
626 Industrial Bank Building
Providence, Rhode Island 02903

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Answer of Defendants William P. Robinson, Jr., Commissioner of Education of the State of Rhode Island, Raymond H. Hawksley, General Treasurer of the State of Rhode Island, and Charles W. Hill, Controller of the State of Rhode Island to the Amended Complaint

Now come the Defendants Robinson, Hawksley and Hill, in the above-entitled matter and answer as follows:

FIRST DEFENSE

The Amended Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks subject matter jurisdiction of the within Amended Complaint as the Plaintiffs lack standing to maintain the within action.

THIRD DEFENSE

To the extent jurisdiction of the Court herein depends on 28 U.S.C.A., sec. 1331, the Amended Complaint is faulty as the amount in controversy is less than $10,000.00.

FOURTH DEFENSE

The Amended Complaint states insufficient facts for the Court to form a Rule 23 class.

FIFTH DEFENSE

1. Defendants deny that jurisdiction is conferred on this Court by 28 U.S.C., sec. 1331 and 42 U.S.C., sec. 1983 et seq.

2. Defendants neither admit nor deny that plaintiffs are registered to vote in Rhode Island, but put the plaintiffs on

their proof; defendants further deny that registration to vote in Rhode Island confers status or standing upon plaintiffs before this Court.

3. Defendants neither admit nor deny the Plaintiffs Hill and Chase are parents, nor that any such children attend public schools, but leave the plaintiffs to their proof; defendants further deny that such facts, if proven, confer standing or status upon plaintiffs before this Court.

4. The Defendants admit the allegations contained in paragraphs 5, 6, 8, 16 and 19 of the Complaint.

5. Defendants deny the allegations contained in Paragraph 2, 3, 11, 12, 14, 20, 21 and 22 of the Complaint.

6. Defendants have insufficient information on which to form a belief as to the status of the plaintiffs as citizens or taxpayers of Rhode Island, and so neither admit nor deny the same, but leave Plaintiffs to their proof; Defendants further deny that such facts, if proven, confer standing on Plaintiffs before this Court.

7. Defendants deny the allegations of paragraph 9 of the Amended Complaint, and further deny their relevance or competence.

8. Defendants answer the allegation in paragraph 7 of the complaint by alleging that the act purports to pay teachers as alleged except that the Defendants are unable to respond to the word "specified" contained in said paragraph and further allege that the act speaks for itself.

9. The Defendants answer the allegations contained in Paragraph 13 of the Complaint by alleging that the act speaks for itself.

10. Defendants answer the allegations contained in paragraph 18 of the Amended Complaint by alleging that the act authorizes payments to teachers, and deny that the payments thereby authorized support any school.

Defendants further deny that any school whose teachers may receive payments under the act discriminates against any teacher or student on a religious basis.

11. Defendants answer paragraphs 1 and 23 of the Complaint by alleging that these Plaintiffs state legal conclusions and require no answer.

12. Defendants deny the allegations of paragraph 17 of the Amended Complaint, and further deny the competence of the facts therein alleged.

13. The Defendants admit that more than 90% of the non-public elementary school students in this State are enrolled in Roman-Catholic Parochial Schools; the Defendants have insufficient information to form a belief as to the truth of the allegations of paragraph 10 of the complaint that 96% are so enrolled, and leave the Plaintiffs to their proof. The Defendants deny the conclusary allegations of Paragraph 10, in that such allegations, if true, are neither relevant nor pertinent.

Wherefore, the Defendants pray that the within complaint be denied and dismissed and that the Defendants have the costs of the action.

William P. Robinson, Jr., et als
by their attorney
Herbert F. De Simone
Attorney General

W. Slater Allen, Jr.
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Answer of the Intervenor-Defendants to Amended Complaint

FIRST DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The relief sought by the plaintiffs would infringe upon the free exercise of the religion of those intervenors who are the parents of children enrolled in Roman Catholic non-public schools in Rhode Island, as well as the free exercise of the religion of their children, and thereby deny those intervenors, their children, and the class that those intervenors represent the rights secured to them by the First Amendment of the United States Constitution.

THIRD DEFENSE

The relief sought by the plaintiffs would constitute an impermissible classification based upon religious ground and would thereby deny to those intervenors who are teachers and to the class they represent the equal protection of the laws secured to them by the Due Process Clause of the Fifth Amendment of the United States Constitution.

FOURTH DEFENSE

FIRST: Intervenors admit that Paragraph 1 of the Amended Complaint sets forth plaintiffs description of their legal claims, and as such, requires no response.

SECOND: Intervenors admit the allegations of Paragraph 2 of the Amended Complaint.

THIRD: Intervenors admit the allegations of Paragraph 3 of the Amended Complaint.

FOURTH: Intervenors allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Amended Complaint, and intervenors demand strict proof thereof.

FIFTH: Intervenors admit the allegations contained in Paragraph 5 of the Amended Complaint.

SIXTH: Intervenors admit the allegations contained in Paragraph 6 of the Amended Complaint.

SEVENTH: Intervenors answer the allegations of Paragraphs 7 and 8 of the Amended Complaint by alleging that the statute in question speaks for itself.

EIGHTH: Intervenors allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Amended Complaint, and intervenors demand strict proof thereof.

NINTH: Intervenors deny the allegations contained in Paragraph 10 of the Amended Complaint.

TENTH: Intervenors deny the allegations contained in Paragraph 11 of the Amended Complaint.

ELEVENTH: Intervenors deny the allegations contained in Paragraph 12 of the Amended Complaint.

TWELFTH: Intervenors answer the allegations of Paragraph 13 of the Amended Complaint by alleging that the statute in question speaks for itself.

THIRTEENTH: Intervenors deny the allegations contained in Paragraph 14 of the Amended Complaint.

FOURTEENTH: Intervenors deny the allegations contained in Paragraph 15 of the Amended Complaint.

FIFTEENTH: Intervenors admit the allegations contained in Paragraph 16 of the Amended Complaint.

SIXTEENTH: Intervenors allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Amended Complaint, and intervenors demand strict proof thereof.

SEVENTEENTH: Intervenors deny the allegations contained in Paragraph 18 of the Amended Complaint.

EIGHTEENTH: Intervenors admit the allegations contained in Paragraph 19 of the Amended Complaint.

NINETEENTH: Intervenors deny the allegations contained in Paragraphs 20 and 21 of the Amended Complaint.

TWENTIETH: Intervenors admit the allegations contained in Paragraph 22 of the Amended Complaint.

TWENTY-FIRST: Intervenors deny the allegations contained in Paragraph 23 of the Amended Complaint.

WHEREFORE, intervenors demand judgment dismissing the Amended Complaint and providing for all appropriate relief.

By their Attorneys,

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DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs*,

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants*,

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants*.

Opinion

[Reported at 316 F.Supp. 112.]

June 15, 1970

Before FRANK M. COFFIN, *Circuit Judge:* RAYMOND J. PETTINE, *District Judge—Rhode Island:* HUGH H. BOWNES, *District Judge—New Hampshire.*

COFFIN, Circuit Judge. Rhode Island's Salary Supplement Act, R. I. Public Laws c. 246 (1969), provides for the payment of state funds to teachers of secular subjects in non-public elementary schools. At present the sole beneficiaries of this statute are teachers in Roman Catholic schools. This suit seeks a declaration that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and an injunction against its continued operation.

Plaintiffs are citizens and taxpayers of the state of Rhode Island. The named defendants include Rhode Island's Commissioner of Education, the state Treasurer, and the state Controller, all of whom are involved in the administration of the Act. In addition, a couple with children in parochial schools and several teachers eligible for aid under the statute have been permitted to intervene under Rule 24(b), Fed. R. Civ. P. Jurisdiction is based on 28 U.S.C. § 1343(3). Since the complaint seeks to enjoin a

state law as repugnant to the Constitution, this three-judge court has been convened pursuant to 28 U.S.C. §§ 2281, 2284.

The complaint alleges in substance that Catholic schools are the primary beneficiaries of the Act, that the goal of these schools is the propagation of the Catholic faith, and that the statute therefore has as its purpose and primary effect the advancement of religion. Plaintiffs also claim that the statute constitutes compulsory taxation in aid of religion and thus violates the Free Exercise Clause. In their answers, defendants and defendant-intervenors have stressed that the Act aids teachers, not schools, and have denied plaintiffs' conclusion concerning the purpose and effect of the Act. Defendant-intervenors have also alleged that the injunctive relief sought by plaintiffs would infringe the free exercise of religion of those whose children attend parochial schools.[1]

The case is now before us for final decision on the merits of plaintiffs' and intervenors' constitutional claims. We have held a hearing, at which we received depositions and documentary evidence, and heard testimony from the Superintendent of Schools for the Archdiocese of Providence,

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[1] Defendants also filed a motion to dismiss on the grounds that plaintiffs lacked standing. This objection we find to be without merit. The standing of taxpayers to challenge state expenditures which infringe the Establishment Clause has long been settled. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). The more recent two step analysis suggested in *Association of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150 (1970), produces the same result. Plaintiffs allege that their tax dollars are being misspent, thus establishing injury in fact. It is also clear that the Establishment Clause was intended to limit the use of public funds in support of religious institutions. *Flast* v. *Cohen*, 392 U.S. 83, 103-104 (1968); *see Everson* v. *Board of Education*, 330 U.S. 1, 11-13 (1947). Thus the interest asserted by plaintiffs is within the zone protected by the First Amendment. *Accord*, *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (E.D. Pa., 1969), *prob. juris. noted*, 38 U.S.L.W. 3401 (U.S. April 21, 1970).

an Associate Commissioner of Education for the state of Rhode Island, and several teachers eligible for aid under the statute. On the basis of this record, we make the following findings of fact and reach the following conclusions of law in compliance with Rule 52(a), Fed. R. Civ. P.[2]

I. *Findings of Fact*

A. *The Statutory Scheme*

The Salary Supplement Act opens with a statement that its general purpose is to implement the established state policy of providing "a quality education for all Rhode Island youth".[3] This declaration is followed by specific legislative findings: that non-public elementary schools enroll 45,000 students, or 25 per cent of Rhode Island's elementary school children; that because of the numbers enrolled, these schools are vital to Rhode Island's educational effort; and that the rising cost of teachers' salaries makes it increasingly difficult for these schools to maintain their traditional quality. The specific purpose of the Act is, in the language of the statute, "to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." To accomplish this objective, the legislature appropriated $375,000 to pay up to 15 per cent of the salaries of teachers of secular subjects in non-public

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[2] In making these findings, we have taken into consideration the evidentiary objections of defendants and intervenors. We have declined to consider evidence concerning the activities of proponents of the Salary Supplement Act for reasons discussed *infra* p. 15 and have also ignored sociological evidence introduced in plaintiffs' post-trial memorandum. We reject, however, intervenors' view that the only relevant evidence concerned the activity subsidized, i.e., secular teaching in parochial schools. Such a narrow view of relevance in effect prejudges the central legal issues of the case.

[3] *Compare* R. I. Const. Art. XII, § 1; R.I. Gen Laws § 16-7-15 (Supp. 1967).

elementary schools. The Act defines "non-public" school to mean a non-profit school whose average per pupil expenditure on secular education does not exceed the average for the state's public schools during a specified period. To qualify for aid, a teacher must have a teaching certificate, must teach a course similar to those offered in Rhode Island's public schools using text books approved for public school use,[4] and must agree not to teach a class in religion.

Regulations implementing the Act call for semi-annual payments to eligible teachers in February and June.[5] Applicants must sign a "Statement of Eligibility" promising not to teach a course in religion and to use only teaching materials employed in the state's public schools. The Commissioner of Education also requires non-public schools to submit data concerning enrollments and total expenditures. If this data indicates a per-pupil expenditure in excess of the statutory norm, an agent of the Commissioner must examine the books of the school in question in order to determine how much of its spending was attributable to secular education and how much to religious.

To date, this final breakdown into secular and religious expenses has proved necessary in only one case. Only two non-public schools have reported expenditures in excess of the statutory norm; and teachers at one of these schools failed to apply for aid, thus obviating the need for further

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[4] *See* R. I. Gen. Laws §§ 16-23-2 and 16-1-9 (Supp. 1967), which authorize local school committees to furnish parochial school children with any mathematics, science or foreign language textbook which appears on the Commissioner of Education's list of books approved for public school use.

[5] The first payment scheduled for February 1970 was delayed by a temporary restraining order entered by the single judge to whom the complaint was originally submitted. The restraining order was allowed to lapse by agreement of the parties, and plaintiffs have waived their prayer for a preliminary injunction.

inquiry.[6] Approximately 250 teachers have applied for aid. It is undisputed that all of these applicants are employed by Roman Catholic schools.

B. *Nature of the Crisis Leading to the Statute*

The evidence introduced at trial fully corroborates the legislature's finding of a financial crisis in non-public education, but indicates that the crisis is largely confined to Rhode Island's Catholic schools. Approximately 95 per cent of the elementary school children attending non-public schools are enrolled in Roman Catholic elementary schools. The financial crisis in these schools stems from the rapidly changing composition of their faculties. As recently as ten years ago, the Archdiocese of Providence relied almost exclusively on nuns to staff its school system. Lay teachers filled only 4 or 5 per cent of the system's 1200 teaching positions. By 1969, lay teachers constituted one third of the teaching force. In the academic year 1970-1971, the great majority of parishes will require at least one additional lay teacher, with some needing two or three more. This precipitous increase in lay personnel—an increase which is expected to continue—has placed a double burden on the parish budgets which finance almost all of the 98 elementary schools. Each shift from a teaching sister to a lay teacher represents a threefold increase in salary expense (i.e., a shift from approximately $1800 to $5500 at present levels). Moreover, the increasing salary levels in public schools make the task of recruiting lay teachers annually more expensive.

The Salary Supplement Act will not relieve the parishes or parents of their escalating burden, but will temporarily enable parochial schools to compete for qualified teachers.

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[6] It is worthy of note that these schools were the only non-Catholic schools to report their expenditures to the Commissioner. As long as Catholic schools rely heavily on nuns, their wage costs are likely to remain substantially below those of public schools, *see infra* p. 6, thus obviating the need to break down expenditures.

A comparison of past and predicted salary levels confirms the limited impact of the statute. In 1968-1969, a starting lay salary in the parochial schools was $5000 a year. In 1969-1970 the diocesan school system offered $6000, hoping that 15 per cent of this amount, or $900, would be paid by the state under the Supplement Act. In the meantime, however, the standard beginning salary for public elementary school teachers in Providence and elsewhere has increased from $6000 to $7000. Even assuming, as does the Superintendent of the diocesan school system, that the parochial schools can compete effectively for teachers if they come within $500 of public school salaries, the diocese must offer a starting salary of $6500 in 1970, of which $975 would be paid by the state and $5525 would be paid by the parish—an increase of ten per cent over the $5000 parish expenditure pre-1969.

The financial implications for both the parishes and the state are clear. Even to continue to subsidize the salaries of the present teacher-recipients at the present percentage figure will cost both the state and the parishes substantially more during the coming school years. But already the Superintendent of the diocesan school system has informed elementary school principles that he expects the present ratio of two sisters to one lay teacher to give way to a one to one ratio in the near future. Moreover, the Superintendent acknowledged at trial that almost all of the teaching staff might be lay persons within five years. Since, as we have seen, the substitution of a lay for a religious teacher means, even at present rates, a threefold increase in salary cost, it is obvious not only that the parochial schools face a monumental and deepening financial crisis but also that the objective and rationale of the Salary Supplement Act—to enable non-public schools to compete effectively for qualified teachers—will inescapably require substantially greater appropriations subsidizing substantially greater percentages of the salaries of lay teachers.

C. *The Parochial School System*

At trial, the parties went beyond the immediate financial crisis in parochial schools to explore the operations of the diocesan school system as a whole. Plaintiffs' evidence was designed to show the close financial and pedagogical nexus between Church and school. Intervenors' testimony explored the teaching of secular subjects in these schools. From this evidence, the following picture emerges.

Rhode Island's Catholic elementary schools are under the general supervision of the Bishop of Providence, and of his appointed representative, the Diocesan Superintendent of Schools. The financing of these schools varies: in some, substantial tuition is charged covering up to 40 per cent of school costs; others charge only a nominal fee and rely on general parish revenues to make up the balance. In most cases, however, the parish assumes the ultimate financial responsibility for the school, and the pastor assumes the ultimate responsibility for the allocation of parish funds. School principals are, with two exceptions, nuns appointed either by the Superintendent or by the Mother Provincial of the order staffing the school. Lay teachers are first interviewed by the Superintendent's office, then by the school principal, with the contract being signed by the pastor of the parish. The Diocese sets minimum salary standards for both lay teachers and nuns, but some discretion is left to the individual pastor in negotiating actual salary levels.

The ground rules for school principals are set forth in a "Handbook of School Regulations", having "the force of synodal law in the diocese." The impression of tidy central management which the Handbook conveys was somewhat dispelled at trial when the Superintendent testified that the Handbook had been frequently superseded either by informal directive or by common practice. Testimony also indicated that individual principals, whether by design or oversight, felt free to make minor modifications in diocesan programs to fit the particular needs of the school.

The main thrust of the Handbook, however, remains clear. The keynote of education in a parochial school is perhaps best reflected in the Handbook's remarks about the importance of a teacher: "The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher. . . ." Consistent with this view is the Handbook's view of the scope of religious activities: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Teachers are further advised by the Handbook to try to stimulate interest in pursuing religious vocations and in missionary work.

This concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school. This testimony gains added credibility from the fact that several of the teachers were non-Catholics. Moreover, because of the restrictions of Rhode Island's textbook loan law, R.I. Gen. Laws §§ 16-23-2, 16-1-9 (Supp. 1967), and the explicit requirement of the Salary Supplement Act, teaching materials used by applicants for aid must be approved for use in the public schools.

Nevertheless, the diocesan schools do possess a number of distinctively religious attributes which distinguish them from public schools. Each parochial school is in close proximity to the parish church, allowing a convenient access for Mass or other religious exercises. The exterior of the school often has an identifying cross; each classroom contains a crucifix and school interiors generally exhibit religious paintings and statuary. Classes each day begin with a prayer; some schools schedule additional times for prayer. Roughly thirty minutes a day or one hundred fifty minutes a week are devoted to religious instruction. Assembly programs sometimes include a speaker on religious vocations or missionary activity, and some extra-curricular

activities, such as altar or choir boy training and missions programs, are religiously oriented. Students and faculty participate in a yearly retreat and all teachers participate in a two day annual meeting of the Catholic Teachers Institute in which the teaching of religion is occasionally discussed. Occasional guidance counselling, including religious counselling, takes place at the elementary level.

In addition to these factors, the Church gains special advantage from a curriculum which contains both religious and secular subjects. When religion is part of the school day, children can be instructed in their faith more frequently, with less absenteeism, and with greater attention to the religious development of each child. Moreover, religious instruction can be staggered throughout the day to utilize more effectively the limited number of qualified teachers of religion. Finally, we note that the presence of dedicated sisters, though diminishing in numbers, provides an atmosphere where religious instruction and religious vocations seem natural parts of everyday life. Indeed, concern for this intangible "religious atmosphere" has led the Superintendent to decide tentatively to attempt to maintain a one sister to one lay teacher ratio in most of the diocesan schools rather than permitting some to be staffed predominately by lay teachers. To go below this norm would, the Superintendent feared, dilute the Catholic atmosphere of the parochial schools.

Implicit in these findings, we think, is the further finding that the diocesan school system is an integral part of the religious mission of the Catholic Church. It is not that religious doctrine overtly intrudes into all instruction. Rather the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation. It also seems clear to us that this essentially religious enterprise

cannot succeed without good teaching in secular subjects. If the quality of teaching falls too low, then not only will Catholic parents be reluctant to enroll their children, but the parochial schools would also run afoul of Rhole Island's education laws.[7] Good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms.

These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise.

II. *Conclusions of Law*

A. *Plaintiffs' First Amendment Claims*

With these findings in mind, we turn to the central legal issue of the case, whether Rhode Island's Salary Supplement Act violates the First Amendment's provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", as applied to the states through the Fourteenth Amendment. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Everson* v. *Board of Education, supra* n. 1.

Plaintiffs' free exercise claim need not long detain us. In their complaint, plaintiffs alleged that the statute infringed on the free exercise of their religion by forcing them to pay taxes for religious purposes. But plaintiffs offered no testimony concerning their personal religious beliefs and practices, or lack thereof. Thus they have failed to introduce the kind of particularized evidence necessary

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[7] R. I. Gen. Laws § 16-19-2 sets standards for private schools and requires them to obtain the approval of the local school committee to satisfy compulsory attendance laws. *See also* R. I. Gen. Laws § 16-22-2.

"to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion." *Abington School District* v. *Schempp,* 374 U.S. 203, 223 (1963).

The heart of plaintiffs' case lies in their claim that the Act violates the Establishment Clause. Much of the dispute at trial centered on the appropriate standard for gauging this claim. As of the date of argument in this case, there were three dominant precedents from which the parties drew sustenance. The first was *Everson,* in which the Court upheld a New Jersey statute which permitted reimbursement to parents for bus fares of children attending both public and parochial schools. The second was *Schempp,* proscribing prayers in public schools. The third was *Board of Education* v. *Allen,* 392 U.S. 236 (1968), which upheld a New York law requiring local school boards to loan textbooks to children attending parochial schools.

Plaintiffs have mounted a preliminary attack based on a statement in *Everson* that, "No tax in any amount, large or small, can be levied to support any religious activities or institutions." 330 U.S. at 16. Since the Act appropriates tax monies for employees of religious institutions, plaintiffs maintain, it is clearly unconstitutional. Whatever the continued vitality of the *Everson* test, however, we are satisfied that it cannot be applied in such a literal manner. Although in both *Everson* and *Allen,* tax funds were used to support religious institutions, in both the aid was sustained. Plaintiffs distinguish these cases on the grounds that the cost of bus fares in *Everson* and textbooks in *Allen* was originally borne by the parents rather than the schools. But assuming that state subsidies of buses or books otherwise pass constitutional muster, we find it difficult to believe that these laws would fail because prior to enactment parents bore the costs indirectly, in the form of higher school bills, rather than directly. *Accord, Lemon* v. *Kurtzman,* 310 F. Supp. at 47-48; *Tilton* v. *Finch,* — F. Supp. — (slip opinion at 11-12) (D. Conn. March 19, 1970).

Perhaps recognizing the shortcomings of the *Everson* formulation, both plaintiffs and defendants have focused their argument on the purpose and effect test relied on in *Allen,* 392 U.S. at 243, and first enunciated in *Schempp:*

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ." 373 U.S. at 222.

The first part of this test—determining the statute's purpose—presents little difficulty. The Salary Supplement Act, in our opinion, was not intended to advance or interfere with religion. The statute itself recites that its purpose is "to provide a quality education for all Rhode Island youth, those in public and non-public schools alike." Certainly, the quality of education in non-public schools is a legitimate legislative concern. *Board of Education* v. *Allen,* 392 U.S. at 245-247. We find nothing in the history and structure of the Act which suggests that the legislative purpose was other than as declared.

In reaching this result, we necessarily reject plaintiffs' attempt to divine the "true intent" of the legislature by inspecting the activities of lobbyists. As Mr. Justice Frankfurther observed in *McGowan* v. *Maryland,* 366 U.S. 420, 469 (1961), "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing." *See United States* v. *O'Brien,* 391 U.S. 367, 383-385 (1968). Nor do we think that the legislature revealed a forbidden motive when it stated that the proposed legislation was designed "to assist non-public *schools* to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of

quality." (Emphasis added.) Phrasing the test in terms of schools instead of students does not, we think, obscure the legislature's legitimate concern for the quality of education afforded to Rhode Island youth. Finally, while the restriction of aid to schools whose per pupil expenditure does not exceed that of the public schools may result in excluding, for the most part, private but non-parochial schools from the scope of the statute, this provision also serves the legitimate secular purpose of saving state funds by eliminating schools which can well afford qualified teachers.[8]

The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critcal in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "*the* primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which

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[8] This aspect of the statute comes close to being a "religious gerrymander". Harlan, J. concurring in *Walz* v. *Tax Commission*, 38 U.S.L.W. at 4356. Nevertheless, the standard chosen is religiously neutral and almost any criteria based on financial need would produce the same result.

they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under intervenors' proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities.[9] Equally important, government aid to purely secular activity may nevertheless involve the state so deeply in the workings of religious institutions "as to give rise to divisive influences and inhibitions of freedom." *Abington School District* v. *Schempp*, 374 U.S. at 307 (Goldberg, J. concurring). Such embroilments would escape the narrow focus of intervenors' test.

These deficiencies in the *Schempp* test were, we think, recognized in the recent case of *Walz* v. *Tax Commission of New York City*, 38 U.S.L.W. 4347 (U.S. May 4, 1970), upholding New York's tax exemption for property used for religious purposes. The test as phrased by Chief Justice Burger is still two pronged:

> "Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious

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[9] Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. Finally, we do not intend our reference to "sophisticated bookkeeping" to imply only sham allocations of expenditures; an accounting system might honestly allocate only a small portion of the total costs of a parochial school to the religious function.

beliefs and practices or have the effect of doing so." 38 U.S.L.W. at 4348.

The Chief Justice's phrasing and application of the effect test, however, mark a significant refinement. Gone are the intimations of *Schempp* that the single predominant effect of a statute may be isolated by a process of deductive reasoning based on principle and precedent.[10] Instead, the Court focuses on whether the statute fosters "excessive entanglement" between government and religious institutions. Such entanglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinently, in discussing the alternatives of taxing or exempting church property, the Chief Justice observes:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." 38 U.S.L.W. at 4350.

Walz thus makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards.

When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions in-

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[10] Indeed, we note that neither the majority nor the concurring opinions rely on the *Schempp* formulation.

volved in *Walz*, must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of "secular" education such as Rhode Island already provides its public schools.[11]

On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suitable for public school use. *Compare* R. I. Gen. Laws § 16-1-9 (Supp. 1967).[12] Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This on-

[11] Rhode Island once provided a flat grant for public school teachers' salaries, R. I. Gen. Laws § 16-6-3 *et seq.* (1956), but this system has now been replaced by a percentage subsidy of the cost of education. R. I. Gen. Laws § 16-7-15 *et seq.* (Supp. 1967).

[12] *But see* Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 Yale L. J. 111 (1969), which reviews the contents of the books actually supplied under the New York law and concludes that many were infused with a sectarian viewpoint.

going administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen*, 392 U.S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman*, 310 F. Supp. at 52, private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same standards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296 (1966).[13] Applying these standards to parochial schools might well restrict

[13] We note the increasing resort to the federal courts to rectify alleged wrongs committed by school authorities acting under the color of state law. *E.g., Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) (peaceful protest by high school students); *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (procedural due process for students); *Richards* v. *Thurston*, — F.2d — (1st Cir. April 28, 1970) (length of student's hair).

their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), and in the hiring and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969).[14] At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment.[15] *Accord, Opinion of the Justices*, 261 A.2d 58 (Me. Jan. 15, 1970).

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[14] The regulations of Rhode Island's Commissioner of Education require schools whose teachers apply for aid to comply with Title VI of the Civil Rights Act of 1964, surely the minimum we may expect of any organization receiving significant public support. More difficult problems loom down the road. For example, one pastor deposed that he would refuse to hire a teacher who had been divorced and remarried. The religious discrimination which sectarian schools must of necessity practice may also be used to cloak other, less desirable forms of discrimination. *See, e.g.*, W. Morris, *Yazoo . . . Notes on Survival, Harper's Magazine* 43, 53 (June, 1970). Whatever their solution, these problems indicate that we would have to rethink much of our law, especially the law of equal protection, in order to accommodate an institution which receives significant state aid and yet discriminates on principle.

[15] While we conclude that Rhode Island's statute is unconstitutional, we do not wish to be read as condemning aid in any form to institutions affiliated with religion. We do not, for example, disagree with the result in *Tilton* v. *Finch*, *supra*, which upheld a federal enactment subsidizing secular facilities at private colleges, including church-related colleges. The degree of institutional involvement required by the federal program was episodic and relatively slight. Moreover, denominational colleges do not have the same close financial, legal, and pedagogical relationship to the Church as do parochial schools.

B. *Intervenors' First Amendment and Equal Protection Claims*

There remains for our consideration the equal protection claim of the teacher-intervenors and the free exercise claim of the parent-intervenors. The equal protection claim is the more elusive of the two. Teacher-intervenors apparently assume a Salary Supplement Act restricted by judicial decree to aiding teachers in non-public but secular schools. Such a statutory scheme, intervenors argue, would violate equal protection because it discriminates among teachers of secular subjects on an impermissible ground—i.e., religion. Their argument remains somewhat hypothetical since, as we have seen, the only applicants for aid have been parochial school teachers. Intervenors are, in other words, complaining of the abstract possibility of discrimination rather than the thing itself. Moreover, intervenors' hypothetical scheme would not discriminate on the basis of the teachers' personal beliefs—surely a suspect classification—but on the basis of the institutions which employ them. This distinction between secular institutions which are eligible for subsidy and religious institutions which are not seems to us commanded by the Establishment Clause. Thus, even though religion in general may be a suspect classification, the mandate of the Establishment Clause provides an overriding justification in this case. *Cf. Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

The parent-intervenors present a more plausible claim, based on the Free Exercise Clause. Their complaint rests on the conviction that children take their values to a large extent from their school environment; a school without religion conveys to the child the notion that religion is unimportant. Because of this conviction, parent-intervenors feel in conscience bound to send their children to parochial schools which teach both secular subjects and religion. If, however, the quality of secular education falls too low in

parochial schools, parent-intervenors may well be forced to ignore the dictates of conscience by sending their children to public schools. To avoid this result, intervenors argue that the free exercise benefits which flow from air to parochial education should prevail over the Establishment Clause values protected by strict separation, citing in support of their argument *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

While sympathetic to intervenors' dilemma, we note that it stems primarily from their personal evaluation of public school education. We reject the notion that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated. *See* Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1686-1687 (1969). Certainly it would be anomalous if the First Amendment required the state to exclude religion from the public schools but at the same time to support an entire separate school system in order to facilitate the teaching of religion. Such a result is not compelled by *Sherbert* v. *Verner*, *supra*, which required a minor change in a welfare program to accommodate sabbatarians. The Court was careful to note that such minor accommodation did not entail the kind of involvement of religious and secular institutions forbidden by the Establishment Clause. 374 U.S. at 409. The Court also noted that some burdens on the free exercise of religion could be justified by a compelling state interest requiring uniformity of regulation. 374 U.S. at 406-409. Our case falls within both these exceptions. Not only does the Salary Supplement Act embroil religious and secular institutions, but the Establishment Clause values can be preserved only by denial of direct subsidies to parochial schools. We therefore reject the free exercise claim of parent-intervenors.

III. *Conclusion*

Plaintiffs are entitled to a declaratory judgment that R. I. Public Law c. 246 (1969) violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools, and to an injunction forbidding defendants and their agents from making disbursements to such teachers.

/s/ Frank M. Coffin
Frank M. Coffin
U. S. Circuit Judge

/s/ Hugh H. Bownes
Hugh H. Bownes
U. S. District Judge

Dated at Providence, Rhode Island 15th day of June 1970

Pettine, District Judge—concurring in result, concurring in part and dissenting in part with the Opinion of the Court.

The majority decision holds the Salary Supplement Act unconstitutional for two reasons: (1) its effect is substantially to support a religious enterprise; (2) its operation involves those "reciprocal embroilments of government and religion which the First Amendment was meant to avoid." I concur in the holding of unconstitutionality for the latter reason. However, my disagreement with the former reason requires my separate concurrence.

The Salary Supplement Act does not substantially support a religious enterprise; rather it supports a most important facet of the educational process in modern America, the teaching of all that knowledge presently appropriate for learning, exclusive of religion. That a distinction between the teaching of religion and non-religious subject matter in sectarian schools may be maintained for Establishment Clause purposes seems clear to me from the de-

cision of the Supreme Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). I read *Allen* to invite the inquiry whether the state program under scrutiny has as its effect the advancement of a religion. In answering that inquiry it cannot be presumed that secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment. Only proof will establish that subsidization of an educational enterprise is subsidization of a "religious enterprise." In the instant case not only is the record barren of any proof that the teaching of secular subject matter is a "religious enterprise," but also there is unanimous unrebutted testimony from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes.

I cannot accept the majority's proposal that exclusive focus on the educational function sought to be subsidized is too narrow a standard because "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." Such reasoning equates the legal and bookkeeping definition of "secular" and "religious." The law is equipped to distinguish bookkeeping entries from legally distinct entities. The secular-religious distinction is fundamental; it will take more than accounting machinations to elude it.

The majority's rejection of the plaintiffs' heavy reliance on the principle stated in *Everson* v. *Board of Education*, 330 U.S. 1 at 16 (1947) that "(n)o tax in any amount, large or small, can be levied to support any religious activities or institutions," would seem to suggest that the *Allen* test is controlling. Paradoxically, however, the majority, in the face of *Allen* and without legal justification, conducts an extensive exploration of the evidence relating to the religious "atmosphere" in the Roman Catholic schools. In my view, *Allen* renders such an exploration irrelevant.

Finally, I would emphasize anew that I agree with the majority that *Walz* v. *Tax Commission of New York City*, —— U.S. —— (May 4, 1970) supplements *Allen*, to the extent that multiple effects of a statutory scheme may be considered, including its potential to create continuing controversies inimical to the values of the First Amendment. *Walz* does not, however, provide any precedent for the majority's assumption that support of the secular educational processes of sectarian schools constitutes "substantial support of a religious enterprise."

With all respect, I concur with the majority's result and only with that portion of the majority's opinion which elaborates the implications of the "excessive entanglements" aspect of the *Walz* decision for the instant case.

RAYMOND J. PETTINE
United States District Judge
June 15, 1970

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Judgment and Order

This action came on to be heard on a motion to dismiss and for trial on the merits before the Court, the Honorable Frank M. Coffin, Circuit Judge, the Honorable Raymond J. Pettine, District Judge for Rhode Island, and the Honorable Hugh H. Bownes, District Judge for New Hampshire, and after hearings thereon, arguments of counsel, the Court having rendered an opinion, dated June 15, 1970, setting forth its findings of fact and conclusions of law pursuant to Rule 52(a) of Fed.R.Civ.P., it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion to Dismiss is denied.

2. Rhode Island Public Law C.246 (1969) is hereby declared to be unconstitutional in that it violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools.

3. The defendants and their agents are permanently enjoined from making any payments or disbursements under Rhode Island Public Law C.246 (1969) to teachers employed by denominational schools.

So Ordered,

RAYMOND J. PETTINE
U.S.D.C.J.
June 17, 1970

NEAL MURPHY
Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Order

This cause came on for hearing on the application filed by the defendants herein and presented orally by the Intervenors herein for a stay of the injunctive relief granted plaintiffs in the Judgment of this Court, and after hearing counsel I find:

(1) That the loss to the Plaintiff Taxpayers of their tax monies to be anticipated to resulted from the

issuance of a substantial stay *pendente lite* as applied for because of disbursements to teachers under Chapter 246, Public Laws 1969 is substantial and controlling;

(2) That the interlocutory stay applied for in the alternative by the defendants will unduly and improperly restrict the Honorable William J. Brennan, Jr., Circuit Justice of the Supreme Court of the United States, in acting on any application for a stay which may be presented to him in this matter by the defendants and/or Intervenors by establishing an arbitrary deadline for his action.

It is therefore ordered that the application be and it is denied for the reasons stated.

/s/ RAYMOND J. PETTINE
United States District Judge

Dated: June 17, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Notice of Appeal to the Supreme Court of the United States

1. Notice is hereby given that the Defendants in the above-captioned matter do hereby appeal to the Supreme Court of the United States from the final judgment declaring Rhode Island's Salary Supplement Law unconstitutional and enjoining the operation of that statute, entered in this action on June 17, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

2. Pursuant to the provisions of Rule 12 (1) of the Rules of the Supreme Court of the United States, the Clerk is requested to certify and to transmit to the Supreme Court of the United States the entire record of the proceedings herein.

Dated: June 25, 1970

WILLIAM P. ROBINSON, JR.
Commissioner of Education

HERBERT F. DE SIMONE
Attorney for the Defendant

/s/ HERBERT F. DE SIMONE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption omitted in printing]

Notice of Appeal to the Supreme Court of the United States

1. Notice is hereby given that the intervenor-defendants in the above-captioned matter do hereby appeal to the Supreme Court of the United States from the final judgment declaring Rhode Island's Salary Supplement Law unconstitutional and enjoining the operation of that statute, entered in this action on June 17, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

2. Pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States, the Clerk is requested to certify and to transmit to the Supreme

Court of the United States the entire record of the
ceedings herein.

Dated: June 26, 1970

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SUPREME COURT OF THE UNITED STATES

Order

WILLIAM P. ROBINSON, ET AL.

v.

JOAN DICENSO, ET AL.

The application for a stay of the order of the United States District Court for the District of Rhode Island entered in Civil Action No. 4239 on June 17, 1970, which application was presented to Mr. Justice Brennan, and by him referred to the Court, is granted, and the said order is hereby stayed pending the timely filing of an appeal in this Court. Should the appeal be so timely filed, the stay will remain in effect pending its disposition. In the event the appeal is dismissed, the stay is to terminate automatically. Should jurisdiction be noted or postponed in the case, the stay is to remain in effect pending the issuance of the judgment of this Court. Mr. Justice Douglas dissents from the grant of the stay. Mr. Justice White and Mr. Justice Marshall took no part in the consideration or decision of this application.

June 27, 1970

EXCERPTS FROM TESTIMONY GIVEN AT HEARING BEFORE THREE-JUDGE COURT

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PROCEEDINGS OF MARCH 18, 1970

[23] Mr. Stanzler: Your Honor, I think we take the easy part now, and I indicate to the Court that there are some stipulations that have been made which I would like to introduce and read into the record. The first stipulation signed by the plaintiffs' attorneys, attorneys for the State and attorneys for the intervenors is as follows: The undersigned on behalf of the plaintiffs, defendants and intervenor defendants do hereby stipulate and consent to the introduction in evidence at the trial on the merits herein of the depositions of Edward F. Wilcox and John R. Earley, taken on February 25, 1970, such deposition to be introduced in evidence subject to the rights of all parties here to present additional testimony from either of said deponents at trial and subject to the rights of the defendants and intervenor defendants to press objections to questions or exhibits which objections were made at either of said depositions, and the parties do hereby further stipulate and agree that each of the plaintiffs is a citizen and taxpayer in the United States and in the State of Rhode Island and a resident and qualified legal voter in the State of [24] Rhode Island and that plaintiffs Hill and Chase are parents of children regularly registered and attending the elementary or secondary grades in public schools of Rhode Island. I would offer this stipulation.

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[38] Mr. Stanzler. I would like to next offer the "Handbook of School Regulations of the Diocese of Providence."

Mr. Collins. I object, your Honor, and I would ask that a foundation be laid for the introduction of this document as to whether it is in effect, whether it has been modified, what parts of it are in effect, whether it is binding, whether it is followed. And we will have substantial evidence on

that. So at this time I object. There is no foundation laid for its entry in evidence.

Judge Coffin. Do you wish to respond?

Mr. Stanzler. Yes, your Honor. Mr. Collins referred a moment ago to Mr. Earley whose deposition was taken; and Mr. Earley is principal of the St. Francis Xavier School. It is on page 8 of his deposition. He was asked about the guidelines and regulations from which the school must work. And, if I [39] may take a moment of the Court, I will read that. On page 8, question number 53:

"Do you make any decisions as to the curriculum and programming for the school?

"Yes, sir.

"Do you have any guidelines or regulations within which you must work and operate the school?

"Well, we have the guidelines insofar as the state regulations are concerned, yes, sir.

"And how about the Diocese, does the Diocese provide you with guidelines?

"The Diocese puts out a handbook of regulations which are a general guideline, yes." And I believe that covers it. This is the deposition which was taken but recently on February 25, 1970.

These are the guidelines and the book of regulations that the witness referred to, and I think they are properly admissible. And it speaks for itself whether it was adopted by the Office of the Superintendent in 1965. And I would suggest that that properly lays a foundation for it. If there had been any revisions or modifications, it would seem to me the intervenor-defendants or the defendants could make reference to the fact that it has been modified or changed. But as of the deposition of Mr. Earley, he did testify that these were the guidelines.

[40] Judge Coffin. Aren't you going to be calling a witness who could say whether or not these are the guidelines in current effect, and, if not, what changes have been made? Would that satisfy Mr. Collins?

Mr. Collins. Yes, your Honor.

Judge Bownes. The deposition doesn't identify these guidelines.

Mr. Stanzler. We didn't specifically identify this exhibit. But it did make reference to the diocese putting out a handbook of regulations. But we did not specifically identify or offer for introduction at that time these regulations.

Judge Bownes. Wasn't that the crux of your objection, Mr. Collins?

Mr. Collins. Yes, your Honor.

Judge Coffin. This exhibit may be marked Plaintiffs' No. 14 for identification, and we shall leave it to testimony to establish whether or not it is current.

(Handbook of School Regulations of the Diocese of Providence marked Plaintiffs' Exhibit No. 14 for identification)

Mr. Stanzler. Briefly, I have one further stipulation between the parties. And it is to this effect, which is the language agreed upon:

That between 90 to 95 per cent of the nonpublic [41] elementary school students in Rhode Island are enrolled in Roman Catholic parochial schools.

That is the stipulation.

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[50] **Edward W. K. Mullen,**

first having been duly sworn, testified as follows:

Examination by Mr. Stanzler:

Q. (By Mr. Stanzler) Father Mullen, you have been subpoenaed to attend this hearing today? A. No.

Q. It hasn't been served upon you?

Mr. Collins: Yes. We've agreed to accept [51] the subpoena for the father.

Judge Coffin: It appears the witness has not volunteered to appear as a witness for you.

Mr. Collins: I wouldn't want to challenge his first answer, Your Honor.

Q. (By Mr. Stanzler) Not having seen the subpoena, Father, I don't suppose that you are aware of the fact that you were subpoenaed to bring the Handbook and Regulations of the Roman Catholic Diocese of Providence? A. I have a handbook with me, yes.

Q. Would you bring it with you to the stand, please?

(Witness leaves stand and returns)

Q. Thank you, Father. For the record, what is your full name, Father? A. Edward W. K. Mullen.

Q. And where do you live? A. I live at 125 Governor Street, Providence.

Q. What is your profession? A. I am a clergyman.

Q. And you are a clergyman for the Roman Catholic Church? A. Yes.

Q. What is your occupation? A. I am superintendent of the schools for the Diocese of Providence.

[52] Q. And how long have you held that position? A. Two years.

Q. And prior to that time, what was the position that you held? A. I was Assistant Superintendent of Schools and Chaplain to the students at Brown University, the Catholic Schools, for a period of about seven years, a little over seven years.

Q. Now, Father, are you familiar with the so-called salary supplement bill that was passed at the last session of the General Assembly of Rhode Island in the year of 1969? A. Yes, I am.

Q. And during that period of 1969, the 1969 session of the General Assembly, were you aware of the developments of the legislature with regard to the bill? A. Yes, sir.

Q. How were you aware of that, Father? A. Namely, through the newspaper.

Q. Did you appear in public, Father, to make public statements in connection with that proposal? A. The only

public appearance I can recall was on Channel 36, a two-part television debate with Mr. Shine.

Q. That's Mr. Shine who is one of the counsel for the plaintiffs, here? [53] A. Yes, sir.

Q. Did you give any interviews to the press relative to the contents of that proported legislation of 1969? A. Yes.

Q. And at that time, what was your position relative to the bill? A. I supported it.

Q. Do you recall the bill as it was originally introduced, Father? A. Yes, I think so.

Q. And do you recall whether or not it made reference to the requirement for public per pupil expenditures that the teachers could only be qualified that come from schools with certain per pupil expenditures? A. I don't believe that provision was in it.

Q. You don't believe it was in the original— A. Yes, when the bill was first introduced.

Q. However, as was subsequently adopted by the legislation, there was a requirement that you do recall where it was a per pupil expenditure requirement in order to be eligible for it, is that correct? A. That's correct.

Mr. Allen: Your Honor, it is my understanding my objection covers this line of inquiry?

[54] Judge Coffin: Yes, it does.

Q. Now, do you recall any other occasion at which you took a position publicly in connection with the legislation? A. No, I don't. I mean, I didn't speak at any parish meetings or any other public events that I can recall.

Q. Do you recall how many times you made any statements to the press regarding the legislation? A. Somewhere between five and ten or—

Q. And these statements were made during the period of time that the legislature was considering the bill as introduced initially? A. Yes.

Q. And were any of these statements made just prior to—strike that.

Q. Were you aware of the consideration of the legislature in amending the legislation as it was introduced

originally? A. I don't fully understand the question, sir.

Q. Well, you know that the legislation was amended as it came from the legislature, from the time it was originally introduced? A. Yes, sir.

Q. Were you aware of any reconsideration of the provisions of that legislation as originally introduced? A. Are you referring to the provisions of the, about the per [55] pupil cost thing?

Q. Yes. A. Was I aware of that while it was being—

Q. Yes. A. No, not really.

Q. You say "not really"? A. I didn't become aware of the fact that this was being contemplated, I don't think, until the matter was actually before the General Assembly.

Q. Did you communicate with any legislators regarding the salary supplemental law? A. Regarding the whole law?

Q. Yes. A. I did. Mr. McKenna, in his capacity as a member of the Board of Directors of the Citizens for Educational Freedom, that was one of the groups that was sponsoring the legislation.

Q. But he is a member of the legislature? A. Yes, sir.

Q. He is a representative in the House of Representatives? A. Yes, sir.

Q. How many times did you confer with him with respect to that legislation? A. I believe it was three times.

[56] Q. Now, did you confer with him prior to the introduction of the legislation initially? A. Yes, I think I did, or when I say "with him," I mean as part of the group of the Citizens for Educational Freedom group, not alone.

Q. As I understand it, then, you met with Representative McKenna while he was conferring with other members of the Board of Directors of the Citizens for Educational Freedom? A. Yes, sir.

Q. What is the Citizens for Educational Freedom? A. It's a private organization, national scope, which seeks to promote public assistance for non-public schools in various ways.

Q. Is it directed only to non-public schools or to just the Roman Catholic Schools? A. Oh, non-public schools gen-

erally. This organization is very strong in the mid-west where there are a considerable number of non-Roman Catholic non-public schools.

Q. Now, prior to the introduction of the bill, do you recall how many meetings of this organization that you attended with Representative McKenna? A. I think just one before the introduction of the bill.

Q. Did Representative McKenna head this organization prior [57] to last year? A. In effect, yes, I think he had the title of Acting President, or something like that.

Q. That's for the State organization? A. Yes, sir.

Q. And at these meetings that you attended with Representative McKenna, there were discussions relative to the terms of the legislation for introduction in the General Assembly to bring about aid for the non-public schools? A. Yes.

Q. Was that the main thrust of the meeting that you attended? A. Yes.

Q. Now, do you know whether there were hearings before the General Assembly on this so-called salary supplement bill? A. Yes.

Q. Did you personally appear to testify? A. No.

Q. Did you have a representative go in your behalf? A. Yes.

Q. And who was that? A. Mr. Frank Burns of Pawtucket.

Q. And when I say "representative," in what way did he represent you? A. He was at the time Vice Chairman of the Diocese School Board.

[58] Q. And did he read a statement for the Diocese School Board at the time? A. Yes.

Q. Representing the Diocese School Board? A. Yes.

Q. That statement urged the General Assembly to enact the legislation that was introduced? A. Yes.

Q. Do you recall whether that statement was urging the enactment of the bill as introduced or as amended? A. No, that I do not recall.

Q. Do you know whether or not any other religious groups urged the General Assembly to enact this law? A. I don't know.

Q. Now, Father, you did appear on television and made statements to the press relative to the enactment of the law and the reasons for its passage. What were your reasons for the enactment of this law?

Mr. Collins: I object, Your Honor.

Mr. Allen: I object. This is subjective evidence, why he might like the law.

Mr. Stanzler: Well, I think his urging upon the legislature might carry some weight and indicate the aid which I think we can demonstrate. I think we will [59] admit the aid was necessary to help the Roman Catholic Schools.

Judge Coffin: But this is not what he said to the legislature, this is just his own view.

Mr. Stanzler: Well, perhaps I can clarify it with one other question.

Q. Father Mullen, a statement was prepared by the Vice Chairman of the Diocesan School Board. Did you participate in the developing and preparing of that statement? A. Yes, sir.

Q. When the Vice Chairman of the School Board was preparing, or did make that statement, it was made with your knowledge? A. Yes.

Q. And the reason from the point of view of the Diocesan School Board was set forth in that statement as to why the legislation should be enacted? A. Yes.

Q. What were the reasons for the Diocesan School Board urging this legislation?

Mr. Allen: I object. There is no showing here that the legislature adopted or rejected or even gave any consideration to Mr. Burn's appearance. I mean, any number of other people might have gone there and said any number of other things. I think now we are really trying [60] to psychoanalyze the legislature. I really object to pursuing this.

Judge Coffin: By the way, do hearings in the Rhode Island legislature get published?

Mr. Stanzler: No, Your Honor, they are not transcribed —on certain occasions they are. I don't think these hearings were.

Judge Bownes: As a matter of practice, normally, they do not transcribe the hearings?

Mr. Stanzler: No, Your Honor.

Mr. Allen: I have no disrespect for this witness, Your Honor. Nevertheless, I think it is difficult to pick apart the legislature's mind by this proceeding.

Mr. Collins: May I reflect that I object also?

Mr. Stanzler: May I just say in answer to Mr. Allen's statement, we are not attempting to psychoanalyze the General Assembly. We are asking the reasons why the Diocese School Board supported legislation. I think it might give the Court the benefit of—

Mr. Collins: Well, if that is so, then Mr. Shine ought to testify as to why he opposed it, and everyone else who testified pro and con or in the middle should so testify, and the Court can make its decision as [61] to what might have motivated the legislature. That is the problem we have with inviting this man to take the stand and attempt to search the quarters of this man's mind.

Mr. Stanzler: It's not his mind, it's the statement of the Diocesan School Board, not this man's mind.

Judge Coffin: Just a moment, gentlemen—Mr. Stanzler, do you have a copy of the diocesan statement that was given?

Mr. Stanzler: No, I don't, but I was waiting for the Court's ruling. I was going to ask the father if he might have a copy of that.

Judge Coffin: We are willing to, as we announced earlier, indulge a fairly broad scope, because of the importance of gathering a record which will not ultimately be thought to be insufficient. Therefore, we are willing to accept into evidence the diocesan statement of the time, but we are

not willing to do it by Father Mullen's remembering what it might have been.

Mr. Stanzler: Thank you, Your Honor.

Q. Father Mullen, is there a copy of the statement that was prepared by the Diocesan School Board that was read to the General Assembly in your possession, or to your knowledge, in your office? [62] A. I think I can find one, yes.

Q. And would you be willing to produce it for the benefit of the Court and have it introduced in this case? A. Yes, sir.

Q. Now, Father, you followed the progress of this bill through the General Assembly rather closely, did you not? A. Yes, sir.

Q. And is it fair to say that the reason you followed the bill rather closely and watching its passage was that the Catholic Parochial Schools were in dire financial straights? A. Yes.

Q. And were there any other reasons or arguments—strike that, please.

Q. Were there any other reasons why you were closely watching this legislation as it went through the General Assembly? A. Yes, because of our financial difficulties it was becoming more difficult every year to obtain the necessary quantities of properly qualified lay teachers, and it was a matter of great concern to me because I was hopeful that this legislation would enable us to hire the kind of people we needed in sufficient numbers in order to maintain the quality of instruction that we are used to.

Q. But this basically was the financial condition of the schools, that was the reason for your interest in the [63] legislation? A. No, no. The financial conditions of our schools was the reason for the deterioration of the quality in teachers. It was the quality of the instruction that was really bothering me.

Q. Well, Father Mullen, you recall participating in a deposition of February 25, 1970? A. Yes, I do.

Q. And have you read the deposition since that time? A. Yes.

Q. And do you recall the statement that you made at that time relative to a similar question which was asked of your with respect to the reasons or arguments that were made by you to the General Assembly or public for the enactment of this legislation?

Judge Pettine: Mr. Stanzler, do you have any question there of the answer?

Mr. Stanzler: Yes, Your Honor.

Judge Pettine: Is it a contradiction to what the father said?

Mr. Stanzler: It seems to me it may.

Judge Pettine: Then I suggest you read the question and the answer to him and ask him if he remembers that was the question and the answer he gave.

[64] Q. I am reading here, it's an intervening question, I am reading here Question 39 on Page 7. "And on a number of occasions, in fact, didn't you make statements that the Catholic Parochial Schools were in dire financial straights, or words to that effect? A. Yes. Q. And that aid such as was involved here was necessary in order to allow them to continue to operate? A. If they were to continue to operate on their present scale which I think is an important qualification. Q. You followed, I take it, the progress of this bill through the General Assembly and up to the time it was enacted very closely; is that fair to say? A. Yes. Q. And are you aware of any other substantial reasons or substantial arguments that were submitted to the public and to the General Assembly as reasons for enactment of this legislation other than you have described here? A. You mean, reasons given by other people? Mr. Shine: Yes. The Witness: Well, no."

Mr. Collins: I submit, Your Honor, that is the same as the testimony he has been giving.

Judge Coffin: Yes, the difference eludes us.

Mr. Stanzler: But the point, what eluded me was that you mean these are given by other people. I'm sorry. I apologize, Father.

[65] Q. Now, Father, were there some other—I think you may have indicated, did you not, that at that time the parish could not provide a staff to carry on the schools? A. I would like you to read—that sounds a little peculiar to me.

Q. Throughout the early part of—

Judge Bownes: Mr. Stanzler, I am sorry, but I am confused now. Are you going to ask him if he remembers these questions or are you going to do what you started out to do originally, ask him the question and then if there is some discrepancy, refer to the deposition? Wouldn't that be better?

Q. Father, is it not so that during the year, the early part of 1969, that you made a statement to the press that certain of the Catholic parochial schools were being closed down for financial problems? A. Yes, sir.

Q. And now, Father, when the bill was passed by the General Assembly, did you issue a statement in response to inquiry from the press on or about the day the law was passed, if you recall? A. Yes, sir.

Q. And do you recall what you said at that time? A. Well, I said something to the effect that I was delighted [66] that although the amount of money involved was quite small, it would nevertheless do quite a bit of good.

Q. Now, I think I previously asked you whether or not any other religious groups appeared before the legislative session, and I believe you said no. Do you know whether or not there were any representatives of any other schools other than the Roman Catholic parochial schools that asked or requested passage of this legislation?

Mr. Allen: If he knows.

Mr. Stanzler: That's the question.

A. I really don't know. Not that I was aware of.

Q. Now, Father, is there a guideline or handbook which governs the Roman Catholic Parochial Schools under your supervision? A. Yes, sir.

Q. Do you have that handbook with you? A. Yes, sir.

Mr. Stanzler: I think that's in evidence as Plaintiff's Exhibit Number 14 for Identification, as Number 14, that is the Handbook of School Regulations for the Diocese of Providence.

[67] Q. And that was published in 1965? A. Yes.

Q. And is that the handbook which is now in effect? A. Yes, except insofar as it has been superseded by later directives.

Q. Have there been any formal directives or written directives which supersede that handbook? A. Yes.

Q. Do you have those with you? A. Why, yes, I have some.

Q. When were those adopted? A. Well, let me explain. We have never issued any sort of a directive which explicitly says this repeals section such-and-such of the handbook. Perhaps we should but we are not all that efficient, you know. When a change is needed we simply issue a directive to the principals, and that then becomes the effective operating procedure.

Q. When you issue the directive to the principal is it in written form? A. Yes.

Q. Have these been issued to the principals? A. Yes.

Q. But, nevertheless, the handbook, subject to that, is still in effect. A. Yes.

[68] Mr. Stanzler. I would like to now offer the handbook.

Mr. Collins. Your Honor, may I voir dire the witness with respect to that?

Judge Coffin. Yes.

Voir dire examination by Mr. Collins

Q. Father, you said that some portions of the handbook have been superseded by written directive. Have any portions of the handbook been superseded by practice? A. Yes.

Q. Were there any portions of the handbook that were never put into practice? A. Yes.

Mr. Collins. Under the circumstances, your Honor, I would object to the handbook going in in general. If the

other side would advise what portions of it they are relying on, I think they should ask Father whether those have been superseded, whether not. That is my problem.

Judge Coffin. Mr. Stanzler, Mr. Collins, we suggest the following procedure be attempted: That is, if you would use time during the lunch hour or after your lunch to try to settle what parts of the handbook you are particularly interested in, what parts of that area have been changed by formal directive, with such information as you can gather or agree on, what parts are claimed to have been changed by [69] practice. In other words, I think we would expedite matters if you and Mr. Collins and Mr. Allen—perhaps Father Mullen could be of some help—could winnow out what we need; not only what the handbook is as printed, but we would be interested in knowing what the records have been and what changes have been accomplished other than through directives, if it is agreeable?

Mr. Collins. Yes, your Honor.

Mr. Pfeffer. We would like to consult on that for a moment, if your Honors please. May we consult on that for a moment?

(A pause)

Mr. Stanzler. May it please the Court, I would, of course, be willing to and would accept the Court's suggestion. It is our position that the handbook, however, would be properly admissible whatever directives there may have been amending this. But we believe that the entire document is properly admissible. And insofar as the essence of it, what portions of it may or may not have been modified, depending upon statements we don't know about that may have been given to other school principals or teachers, we believe it really goes to the essence of the weight to be given to the handbook.

Judge Coffin. What would be helpful to us is if we could have the original handbook. But the defect of the [70] original handbook is that we now know there have been some changes, and we would like to have those parts that

have been changed by directive. And, ideally, we would like to have the handbook that is put into evidence marked as to passages which have never been put into practice. And if there is disagreement, we will take that into account. We don't insist that you agree to that.

Mr. Stanzler. We certainly don't know which parts of the handbook were not put into practice. And if one examines the handbook and sees the directive of the Bishop of Providence that is set forth on the first page, we would argue that, of course, goes to the weight as to whether it has been put into practice or not and what the position is of various principals and teachers.

Judge Coffin. It would simplify matters if you could spend some time doing that.

Mr. Stanzler. We will attempt to do that.

Judge Coffin. This would save time for Mr. Collins later on in trying to elicit from Father Mullen what particular sections have never been put into practice. And if you could agree, even as to what the testimony might be,—I think ingenious counsel can sometimes do more than they think they can.

With that in mind, it is 12:25 and we have given you a bit of a chore to do. Are you nearly through with Father [71] Mullen?

Mr. Stanzler. I think Father would probably have to come back anyway.

Judge Coffin. Then let us recess until two o'clock.

(Noon Recess)

[72] Afternoon Session

Mr. Allen: May it please the court, this is probably as good a time as any, in the deposition of Mr. Wilcox that was previously admitted this morning, Your Honor, on Page 7—it seems insignificant—I want the record to be consistent right through. In the answer to Question 27, Mr. Wilcox refers in the fifth line of his answer to Mr. Peter Mazzeo. All counsel are agreed that, in fact, he is refer-

ring to Mr. Peter M-A-S-C-I-O, a gentleman who Judge Pettine will remember at one point was offered as a witness earlier in the proceedings in this matter.

Mr. Stanzler: Your Honors, during the lunch break counsel attempted to get together and made some progress or we were beginning to make progress when we were interrupted by the unusual situation and we have not concluded the determination of the various portions of the Handbook. We could proceed as the court sees fit. We could resume with Father Mullen's testimony and at the conclusion of his testimony attempt to resume our discussion relative to the Handbook. I do not think it will take too much [73] longer.

Judge Coffin: You suggest proceeding with Father Mullen?

Mr. Stanzler: Yes, I think we could do that.

Judge Coffin: Very well.

Mr. Collins: Your Honor, I think I am in total agreement with that. However, I do think it is going to take a substantial period longer to go through the Handbook. The suggestion was made by one of the lawyers that perhaps we should do that this evening and that might save time rather than doing it now.

Mr. Pfeffer: We would have no objection to that, Your Honor. Our case will be completed with Father Mullen.

Judge Coffin: The only question I have here is whether you need an authenticated version for examination of Father Mullen or whether that is independent of your examination of Father Mullen.

Mr. Stanzler: I will show him Exhibit 14 for identification and ask him if that is the same Handbook that has been distributed in the past.

[74] Judge Coffin: I think the sensible procedure then is to proceed with Father Mullen and take your time this evening to make what progress you can make.

Mr. Pfeffer: One other agreement reached during the lunch recess, in the earlier depositions produced there is a reference to a pamphlet which was not otherwise identified. Both parties and counsel agree that that Handbook in Mr.

Earley's testimony refers to the document Exhibit 14 for identification. That document is referred to by him in his deposition.

Reverend Edward W. K. Mullen, Resumed

Direct Examination by Mr. Stanzler

Q. Now, Father Mullen, I show you Exhibit 14 for identification which has on the front of it "Handbook of School Regulations," and I ask you if that is the Handbook that you have referred to as being distributed to principals or a copy of it? A. Yes, this is the Handbook.

Q. Now, what function does the Handbook serve, Father? A. It serves as a guide to the schools in the day-to-day operations of operating the school.

[75] Q. And is it considered binding upon the schools in terms of policy and administration? A. Yes, again, it is something so far as it has been amended later on. "Binding" is rather a difficult word. Some bulletins are more binding than others, but generally speaking yes.

Q. So it serves as a guide and is binding with respect to the administration and operation of the schools? A. Yes.

Q. And does every principal obtain one of these Handbooks? A. Yes.

Q. Do any of the teachers receive these? A. They were originally intended to, but in fact they do not—only the principal has one.

Q. Since 1965 when it was first adopted, were they issued to the teachers? A. I don't remember really what happened in 1965, but since then only principals have been given Handbooks.

Q. They are maintained in the schools? A. Yes.

Q. Each principal maintains his own Handbook? A. Yes.

Q. Now, obviously from what we are talking about here, [76] the Roman Catholic parochial schools in the state have religious teachers and lay teachers? A. Yes.

Q. And are there any fathers or priests teaching at any of the elementary schools to your knowledge? A. No, only

—well, occasionally priests from the parish will teach religion, but aside from that no.

Q. Could you tell the court how many elementary schools there are in the Diocese of Providence? A. Ninety-eight.

Q. And out of the 98, do all of the schools—of all of the 98, do all of them have a combination of lay and religious teachers? A. With one exception. Well, more than that. There is one school which has all lay teachers and there are, perhaps, two or three which have all religious. Other than that they are combinations, yes.

Q. So there are two or three schools that have all religious teachers? A. Yes.

Q. And the one that has all lay teachers, does that have a lay principal as well? A. Yes.

[77] Q. That is the school which Mr. Earley is principal of? A. Yes.

Q. Saint Xavier's School in East Providence?

Judge Coffin: These are elementary schools?

Mr. Stanzler: Yes.

Q. Now, what is the ratio of religious teachers to lay teachers, approximately, in each of the schools? A. Well, the ratio varies quite a bit from school to school. The Diocesan averages about two to one, two religious for one lay.

Q. Now, what do you mean by religious teachers? A. Sisters, nuns.

Q. Sisters? A. Yes.

Q. Now, approximately how many students are there in the elementary schools? A. Twenty-nine thousand and change. I think it is 29,340 somewhere.

Q. As long as, I suppose, we are talking about the elementary schools, we ought to define what grades those include? A. One to eight.

[78] Q. Grades one through eight? A. Yes.

Q. And substantially most of the children who attend these elementary schools are of the Roman Catholic faith? A. Yes.

Q. Now, the elementary schools are, and I believe you identified them, as 98 in number, are those all parish schools? A. The great majority of them are, but not all of them.

Q. And these great majority that are parochial schools, does that mean they are owned and operated by the parish itself? A. Yes.

Mr. Stanzler: I think you wanted to add something.

The Witness: I thought I would give you the figure for those who were not.

Mr. Stanzler: Would you, please?

The Witness: There are, let's see, there are currently three that are inter-parochial, that is, operated by two or three parishes. There are six which are private; that is to say, operated [79] by a religious community, a community of sisters who own and operate the schools, and there is one which is operated by the Diocese and there is one—I have to correct that. When I say "three regional," there are only two that are operated by more than one parish. There is one school which is operated by a separate corporation. It is an autonomous school. It is not affiliated with any parish or the Diocese.

Q. That is run by an order? A. It is operated by a board of directors under a legal incorporation under the state laws of incorporation, a non-profit agency.

Q. Now, who appoints the principals to the schools? A. In the majority of cases the Mother Provincial of the order of sisters which staffs the schools. In the case of the Sisters of Mercy schools, of which there are 30, in the last two years I have appointed the principals. In two cases the pastor appoints the principal. That is Mr. Earley's school and Saint Sebastian's School in Providence which has only one sister and in the case of Saint Charles' School, which is the autonomous school I mentioned, the principal, I believe, is appointed by the board of [80] directors of that school.

Q. Now, I think we may have brought this out before, but except for Mr. Earley, Father, each of the principals is either a priest or a nun? A. No, there is one other lay

principal. Saint Sebastian's School has a lay principal also. There are no schools that has a priest principal.

Judge Bownes: Because they are elementary schools?

The Witness: Yes, they are sisters.

Q. Now, how are the teachers engaged, let's take the religious teachers or nuns? A. They are appointed by the Mother Provincial.

Q. And the lay teachers, how are they appointed? A. Well, the contract for the lay teacher is signed with the pastor. The recruiting process starts in my office and one of my assistants interviews all applicants. They fill out an application and she interviews them and passes on the qualifications and if they are suitable she then refers them to a pastor who signs the contract with them.

Q. At the school itself, if you know, is it the pastor who interviews the teacher or the principal who [81] interviews the teacher, that is, the lay teacher? A. Well, the practice varies a bit from parish to parish. I think in most cases it is the principal.

Judge Coffin: Your office interviews them first and then you refer them to the school and the principal interviews them?

The Witness: Yes.

Judge Coffin: And finally the pastor signs the contract?

The Witness: Yes.

Q. There are times, however, when they are interviewed initially by the pastor of the schools? A. Yes, there are times. This is against the rules but it does occur.

Q. Any, to your knowledge, are substantially all of the lay teachers Roman Catholics? A. Well, the great majority of them are. I would not say "substantially all" by any means.

Q. Now, does each school identify itself by a name?

Judge Bownes: Excuse me, Father, do you have any percentage figures on that, 70 per cent Roman Catholic, 80 per cent Roman Catholic, 90 per cent?

The Witness: Unfortunately, I cannot [82] give you a firm figure, Your Honor. We don't keep those statistics as

such. My estimate would be perhaps 10 to 15 per cent of our teachers are not Catholics.

Q. Now, is each school identified by the name of generally the parish? A. Yes.

Q. And the name is usually set, as I understand it, the school building, the parish school is separate and apart from the parish building? A. It is, yes.

Q. And the school from point of view of physical identification, does it have a cross on the outside of the school? A. Some of them buildings do, by no means all of them.

Q. But they are in close proximity to the parish? A. Yes.

Q. They are usually on the parish grounds and owned by the parish itself? A. Yes.

Mr. Collins: Excuse me, Mr. Stanzler. Your Honor, I would like to note my continuing objection to this type of testimony as to whether the schools have crosses on them and whether they have [83] names on them because I do not think it is relevant.

Judge Coffin: Your point is that it should be focused on the activities of the teachers.

Mr. Collins: Of that which is subsidized, yes.

Mr. Allen: Your Honor, I just want to note my concurrence in Mr. Collins' objection.

Q. Now, how are the elementary schools financed? A. They are financed by the parish which supports them. Usually a tuition is charged to the students and the difference between the tuition and the cost of operating the school is made up from the general parish revenues.

Q. These tuitions are a very small portion of the operating costs, is it not? A. Well, no, the percentage has been increasing rapidly in the last couple of years. I think now it averages about 40 per cent of costs.

Q. And this increase has come up within the last two years? A. It is recent.

Q. I recall you and I having a discussion at Brown University one time and it was somewhat lower? [84] A. Oh, yes.

[85] Q. (By Mr. Stanzler) Now, from the parish funds which are included in the tuition that you say are paid, the parish pays the salaries and buys whatever supplies are necessary? A. Yes, sir.

Q. Now, within each of the classrooms, is there a cross or crucifix? A. In the great majority of them.

Q. And can you, inasmuch as Judge Bownes asked the question with respect to percentages, are you able to tell what percentage? A. No, I'm not, really.

Q. And there are also statues in the schoolrooms? A. Not necessarily in the rooms, but most of the schools do have statues somewhere within the building.

Q. And these depict religious situations? A. Yes, sir.

Q. And they do have paintings? A. In most cases, yes.

Q. And these are religious paintings depicting religious situations? A. Well, not exclusively. There is a considerable amount of secular decor too.

Q. Such as chairs and desks? A. Well, no, such as paintings of secular subjects and so forth.

[86] Q. But there are religious paintings in the schools? A. Yes.

Q. Do the classrooms have religious paintings? A. I couldn't say. I don't visit that many classrooms. I think it would vary quite widely.

Q. There is no question that when one visits a school one knows he is visiting a Roman Catholic Parochial School? A. Yes, that's true.

Q. Now, the class day. Is each class day started with prayers for each of the students in the class rooms? Does each class day start with prayers? A. Yes, traditionally. Prayers certainly at some time in the day are said. I would say usually during the beginning. They are usually said in the beginning.

Q. They are usually said in the homeroom of each of the students, so-called? That room which is the room that everybody, all the children report to when they commence the day? A. Yes, I think so.

Q. In each of these homerooms, there are lay teachers as well as religious teachers? A. Yes.

Q. And the prayers are conducted to your knowledge—

Mr. Collins: I object to that question.

Mr. Stanzler: I haven't finished the question yet.

[87] Judge Coffin: I understood, does each homeroom have a lay and a religious teacher?

Mr. Stanzler: Or a religious teacher.

Judge Coffin: All right.

The Witness: Yes.

Q. They don't have two teachers in each room? A. No.

Q. They either have a lay or a religious teacher? A. Yes, sir.

Q. When they commence the day prayers are supervised and conducted either by the lay teacher or the religious teacher? A. As far as I know.

Q. And during the course of the day there are religious classes? A. Yes.

Q. How much time, to your knowledge, is devoted to religion classes? A. One hundred and fifty minutes a week.

Q. Is that by a rule set forth in the handbook, 150? A. I believe yes. That's 30 minutes per day, or if they don't want to teach it every day, it has to add up to 150 minutes.

Q. Is that a requirement that is set forth in the handbook which guides the principals? A. Well, the weekly time allotment of subject is one of these items that comes out every year at the beginning of the [88] year in September. We vary a little each year according to changes in the curriculum, but that would come out annually.

Q. But basically the handbook for school or the guideline for school, which is Plaintiff's Exhibit 14 for Identification, does make reference, does it not, to the time to be devoted to the study of religion? A. Yes, sir.

Q. And in the study of religion, does this include, it is the study of the various tenets of the Roman Catholic religion? A. Yes, sir.

Q. It is not a study of the history of religion or anything of that nature? A. Not in elementary schools. Some of that is included, particularly in the upper grades.

Q. But primarily it's the Roman Catholic religion? A. Yes, sir.

Q. Now, these religious courses, they are taught by nuns only, is that correct? A. Well, they are taught by lay teachers, too. If the teachers haven't applied for supplement.

Judge Pettine: Would you read that back, please?

[89] (Answer to Question read back)

Judge Bownes: Well, Father, prior to this year, what was the general practice as far as the teaching of religious subjects was concerned by lay teachers?

The Witness: The lay teacher would teach religion if she wanted to, if she felt competent to, which some did and some didn't, but there was no policy at all that prevented a lay teacher from teaching religion, aside from being incompetent.

Judge Coffin: While you are being interrupted, Mr. Stanzler, Father Mullen, why wouldn't a lay teacher apply for supplement? You say if this teacher has not applied, I would have thought that everybody would have applied.

The Witness: Well, not all teachers are eligible to apply for supplement because not all of them were able to get a state teaching certificate; that's one reason. Another would be that a teacher's teaching schedule was not always able to be rearranged.

Judge Coffin: And would some of them be above the average level, that is, a cutoff under the law?

The Witness: For the salary level?

Judge Coffin: Yes.

The Witness: Not that I am aware of.

[90] Judge Coffin: Okay. Thank you.

Judge Bownes: Now, as I understand it, Father, the 150 minutes a week is required for religious teaching, and that

would have to be split up among the religious teachers and the qualified lay teachers, depending upon the ratio in the particular school?

The Witness: Yes, sir.

Judge Bownes: And if you didn't have any religious teachers, that is, sisters in a particular school, then the 150 minutes would have to be taught by lay teachers?

The Witness: Yes, sir.

Judge Bownes: All right, thank you.

Judge Pettine: Now, if I may ask one further question here, Father, since we are at it. In this question that was asked of you, whether or not the class day starts with a prayer, do the classes start with a prayer?

The Witness: Each individual class?

Judge Pettine: Does each class start with a prayer?

The Witness: I can't say for certain. I'm not that familiar with the inside of the schools, but it is my impression that no, that prayers are said at the beginning of the day, and in most cases, then only. In [91] some cases they may also be said at another time later on.

Judge Pettine: All right, thank you.

Q. (By Mr. Stanzler) Would this not also depend upon the teacher as well as if she wanted to commence her class with a prayer? A. Yes, it would be up to the teacher, I suppose.

Q. And certain principals, if they desire, they could set up that practice of commencing each day with a prayer? A. They could.

[92] Q. And during the course of the day are there prayers said; prior to lunch, for instance, or at the conclusion of the day? A. I don't really know.

Q. But that could be done. A. Could be done.

Q. And there are within the handbook of regulations—there is some guide to that; suggestions with respect to that, are there not? A. Yes, but that is one of the portions of the handbook that has been superseded by practice actually.

Q. Not by directive? A. No. Well,— Yes, all right, let it go at that. Yes, that is okay.

Q. What time of day is the religious course taught; the religious course? A. What time of day?

Q. Yes, if you know. A. Traditionally, it is the first period in the morning but in the last couple of years it has tended more and more to be scheduled throughout the day, part of the reason being this bill and the requirement of having only perhaps two or three teachers teach religion so they have to stagger it; but also because religion, like a good many other subjects, has become considerably more sophisticated in the last five years. Not every teacher— in fact, not every sister is [93] any more competent to teach it, and it has become more and more a specialized discipline.

Q. So that you are relying more upon individual trained teachers to teach the course in religion. Is that what you are telling us? A. Yes.

Q. This is a practice that has developed within the last year since the passage of the salary supplement bill, so-called. A. The passage of the bill speeded it up but the practice was introduced before the bill was passed. It is at least three years old, I should think.

Q. This is in order to achieve better competency in the teaching of the religious aspects of the school today? A. That is correct.

Q. Now the schools do have religious observances on certain holidays; that is, religious holidays, do they not? A. Yes.

Q. And how often does this take place? Does that depend upon the school or—I am rather unacquainted with the number of religious holidays . A. Well, let's see. There are maybe four a year on the average.

Q. And these are observances that take place within the school which all the children participate in? A. Well, the usual practice is to have a—on days like this either to have an assembly program during the normal portion [94] of the school day when assembly programs are held or else

to have a Mass during the lunch break in the parish church, so that if the children wish to attend Mass they can go on their lunch hour.

Judge Bownes. Did you say four, Father?

The Witness. About four days a year on the average.

Judge Bownes. In addition to Christmas and Easter what would the others be?

The Witness. Well, of course, Christmas and Easter they are not in school anyway. All Saints Day, November 1st; Ascension, which is normally in May;— Let's see.

Mr. Collins. Good Friday.

The Witness. Good Friday; no. Let's see. Are we out of school on Good Friday?

Mr. Stanzler. I think you are.

The Witness. I think we are not in school Good Friday. Let's see. I have got some of my staff down there. Could I ask them? Is that permissible?

Mr. Stanzler. Well, I think you will have an opportunity as Mr. Collins has indicated he is going to put you on the stand.

Judge Coffin. Yes, I think at the moment all we are interested in is that there are four.

Judge Pettine. If I may follow up, did I understand you to say, Father, a Mass they "may" attend?

[95] The Witness. Yes.

Judge Pettine. In other words, it is not compulsory that they attend.

The Witness. That is correct.

Q. Is a Mass held every day during the lunch hour? A. Not normally, no. In some parishes during Lent this is done, yes.

Q. Would this be the only time of the year that they would hold Mass during the lunch hour? A. Yes, I think so.

Q. And when these Masses are held, are the teachers expected to attend? A. No.

Q. Are Masses held immediately prior to the opening of the school day? A. Well, the normal daily parish Mass

would occur around 7:00 or 7:30, or something, in most parishes. But that seldom has any connection with the school.

Q. Now you say that there are sometimes assembly programs in the schools. Do these assembly programs sometimes include visiting missionaries? A. Yes.

Q. And the missionaries, as I understand it, inform the children and those present of the nature of their work? A. Yes.

[96] Q. What are some of the missionaries that do attend? A. Well, let's see. We have— Once a year, I think, is all that a school is allowed to have a visiting missionary come in on a program like this. And it is scheduled by the—let's see—the Diocesan Mission Program, so that it goes through the Diocesan Mission Office. And they schedule these people and they will come into a school, and each school will have one of these programs a year.

Q. It is just once a year? A. Yes.

Judge Pettine. Is this part of the vocations program? for schools, Father?

The Witness. No, but the vocation program operates the same way. The Vocation Office will schedule a program in each school once a year.

Q. What does the vocation program inclue? A. Well, I am not too sure because I don't have anything to do with it.

Q. What is meant by it? A. Well, it is a program to acquaint the children with the nature of the religious life; the life of a sister, the life of a priest; and to encourage children to think along these lines when they are considering their own future.

Q. Now do the assembly programs consist of— During the course of the year is that— Approximately how many times a year [97] is that during the course of the school year; these so-called assembly programs? I think what we mean by that is when all the children come together in a body. A. Are you referring to all assembly programs or just those that we have been talking about?

Q. All assembly programs. A. That varies a great deal with the school, depending to a considerable extent on the interest of the principal and her ability to gather together interesting programs. But we like them to occur quite frequently; well, once every couple of weeks.

Q. And these programs can range from civic matters to religious matters? A. Yes.

Q. After school do the children have extra-curricular programs? A. Yes.

Q. And these extra-curricular programs are held in the parish school? A. Yes.

Q. And some of these include programs which have a religious content to it? A. Yes.

Q. And these are run by whom as far as supervising position is concerned? A. Well, either by the sisters or the priests of the parish, the ones that have religious contact. [98] Q. What kind of programs would they be? A. Well, training altar boys, training choir boys, a mission—little mission society for the school to encourage missions. I don't know whether there are others but I don't really know what they do.

Q. Now during the course of the year do the teachers of the Roman Catholic Diocese school system attend a so-called Catholic Teachers Institute? A. Yes.

Q. And these include, do they not, both the lay and religious teachers? A. Yes.

Q. And I believe that is held just once a year, is it not? A. Yes.

Q. It is a two-day program? A. Yes.

Q. And general school work and practices are studied at these institutes? A. Yes.

Q. Do any of the institutes discuss the teaching of religion? A. Yes, occasionally.

Q. During the course of the institutes, which are probably to bring all teachers up to date, the programs do consist of ways of improving the teaching of the various courses, both secular and sectarian? [99] A. Yes.

Judge Coffin. I would like to ask Father Mullen: This may be beyond your personal experience but supposing a student is in a science course and remembers something he or she has learned in the religion course and asks the science teacher, "What is your explanation?" Has this happened?

The Witness. I really don't know, Judge. I am not a teacher. I never was.

Judge Coffin. I suspect if it happens, it happens not only in parochial schools but others as well.

The Witness. I should imagine so.

Judge Pettine. To put it differently: There are no regulations, are there, that would prohibit a teacher from discussing such a point should that arise in the teaching of a purely secular subject?

The Witness. That is right.

Judge Pettine. On this assembly is it compulsory they attend assembly? Do you have assembly observance on a religious holiday? Did I understand you to say that was one of the ways that you might observe a religious holiday at the school: by having a general assembly?

The Witness. Yes.

Judge Pettine. Is it compulsory they attend the assembly?

[100] The Witness. I would imagine it would be, yes.

Judge Bownes. I didn't understand your answer to Judge Pettine's question before that. Was the answer that there was a prohibition or there was not?

The Witness. No, there is no prohibition.

Judge Bownes. Can you tell me what the courses are that are taught in addition to the religious education course?

The Witness. All the usual subjects that are taught in the elementary school, all the traditional subjects: literature, reading, spelling, and so forth, mathematics, science, the social studies, art, music, physical education, and a foreign language—French in most schools.

Q. Just one further question, I believe, Father. This morning we made reference to the Citizens for Educational Freedom being devoted to obtaining aid for the nonpublic schools, and you made reference to the Middle West and some success attained there. Am I not correct in that many of the people—many of the schools that have been aided in the Middle West include not only Roman Catholic schools but the Lutheran schools? A. Yes, that is true.

Q. And that the—

Mr. Stanzler. I think— Excuse me just a moment.

(A pause)

Judge Bownes. Father, do you have a standard [101] curriculum of all the subjects taught in the grammar schools in the diocese?

The Witness. Yes, Judge.

Judge Bownes. Could you make it available to us—a copy of it?

The Witness. Yes. Actually, it isn't a full blown curriculum. It is a list of textbooks that are used and the time allotments for various subjects that are to be allotted. But, yes, that can be made available.

Judge Bownes. Could you have that tomorrow?

The Witness. Yes.

Judge Bownes. Thank you.

Judge Coffin. May I go back before we get started again? You say there is no prohibition if a science teacher was asked a question based on religion. Are there any materials for guidance of the teachers of a lay subject when questions stemming from a religious course are asked?

The Witness. No. I suppose we are going on the assumption that this sort of question doesn't really arise on the elementary level. In the high schools it would.

Q. Do I understand you to say that you don't anticipate students on the elementary level to raise these questions in science classes? A. Yes, that is what I said.

Q. The prayers— Just to clarify this, and I think the answer [102] is self-evident. But the prayers that are said at the commencement of the day are Roman Catholic prayers, are they not? A. They used to be. The prayers that are said at the beginning of the day now—it is a matter of practice for the individual schools, and I think much more we are getting into the practice which, I guess, is traditional in Protestantism of sort of free prayers, spontaneous prayer, and they compose it as they go along on the spot. Whether you could classify that as a Catholic prayer or not, I don't know.

Q. These children have all been brought up—

Mr. Stanzler. Strike that, please. I think I will let it go on your answer.

Q. Just one thing I want to clarify further. The home rooms sometimes do have lay teachers who are home room teachers. A. Yes.

Q. And if they are not religious teachers, then they are the lay teachers who are home room teachers. A. Yes.

Q. Just one— I don't know if you have had an opportunity to bring the statement that was read at the General Assembly with you. A. No, I haven't.

Q. But you would be able to bring it for us tomorrow? A. I certainly hope so. I will look for it diligently.

[103] Mr. Stanzler. I think that is all. Thank you, Father.

Cross-examination by Mr. Collins

Q. Father, while we are on this one question, do you expect as superintendent of schools that the teachers in your schools, who are teaching secular courses, are to inject religious content into the secular courses? A. No, I do not.

Q. We talked initially when you were on the stand about two bills that were in the Legislature. Were you in favor of the first bill? A. Yes.

Q. And that is the bill without an amendment. A. Yes.

Q. And is that the bill without a limitation as to the cost per pupil? A. Yes.

Q. Were you in favor of the amendment? A. No.

Q. Do you know who proposed the amendment? A. Not really.

Q. Did you learn of it after the amendment had been proposed? A. Yes.

Q. Father, with the passage of the Salary Supplement Act can you tell us in your capacity as superintendent of schools whether [104] there was an increase, decrease, or remain-the-same status with respect to the quality of teachers applying for teaching positions in your schools? A. We had a considerable increase in the quality of the teachers that applied this past year, yes.

Q. If you can, Father, tell us what your experience was in the summer of '68-'69.

Judge Bownes. How do you determine the quality of the teacher applicant?

The Witness. By their educational background primarily, how many—whether or not they have a Bachelor's degree or Master's degree, or, if not, how close they are to it; how many education courses they have taken; whether or not they have had student teaching or, hopefully, previous teaching experience.

[105] Judge Bownes: You mean that the applicants that applied had a more extensive educational background?

The Witness: Yes.

Q. What took place in the spring, summer of 1968-69 with respect to the recruitment, if you will, of teachers, secular teachers, in your schools? A. We had a very great difficulty recruiting a sufficient number of teachers. We had a very large turnover the previous year and we needed a large number and we simply were not getting applicants with a suitable educational background.

Q. What were you offering new applicants as a salary? A. $5,000.

Q. And what did you offer new applicants as a salary this year, this is '69-70? A. $6,000.

Q. When, Father, do you recruit teachers— .

Mr. Collins: Well, strike that.

Q. When will you be recruiting teachers for next year? A. Starting right about now.

Judge Bownes: How about the sisters and the nuns, are they paid, what is the system of [106] compensation for them?

The Witness: Yes, they are paid a standard salary. They are paid $1800 a year at the current scale if they have a bachelor's degree. If they have a master's degree they get $1900.

Judge Bownes: As far as educational background, how do the nuns and sisters compare with the lay teachers?

The Witness: Generally, they are considerably better.

Judge Coffin: I am bothered—perhaps this is not the time to explore mathematics, but if it increased from $5,000 to $6,000, what you offered between '69 and '70, and you have 98 schools or nearly 100, that would seem to be that each school has a little bit under $4,000 which would be four teachers on the average per school would get that. I just do not see how this money contained in the bill would enable you to raise salaries and offer new teachers $1,000 more.

Mr. Collins: I think, if I may, I can clear that up. I will ask you, Father.

Q. In order for a teacher to receive $6,000 this year, [107] assume for the moment that the state is released and committed to pay, what would the parish have to pay the teacher so that she or he would receive $6,000 a year this year? A. $5100.

Q. Now, the fact that the statute that we are talking about here—the effectiveness of it has been temporarily restrained and the fact that the issue is in doubt in this case, what role does that play in your recruiting of teachers for next year? A. It hinders us rather considerably because it is difficult for us to come up with a definite wage that we can offer teachers and when you go around

to the Teachers Colleges and try to recruit them and tell them you do not really know how much you are going to be able to pay them it is pretty hard to get a commitment out of them.

Q. How about the teachers that are presently teaching in your schools that are coming up for—

Mr. Collins: Strike that.

Q. Your teachers in your schools usually receive a contract for how many years? A. A year at a time.

[108] Q. How about the teachers whose contracts will expire, do you have any difficulty by virtue of the situation we find ourselves in with respect to maintaining these teachers? A. Yes.

Q. Is that for the same reason? A. Yes, we don't really know what we can offer them next year.

Q. Now, is there going to be an increase, insofar as you know, Father, an increase in the starting salaries which will be paid to teachers who begin this year in the public school system? A. In the public schools?

Mr. Collins: Yes.

The Witness: Oh, yes. Let's see, Providence has already settled for a scale of $7,000 to $11,000 and I think Newport has and also a couple of other places. That is going to be a standard or close to the standard for the state for next year.

Q. Now, if this Salary Supplement Statute is determined by this court to be unconstitutional, what will your school system offer starting teachers? A. I don't think we would be able to offer more than [109] $6,000.

Q. Have you had any experience, Father, with respect to competing with the public schools for the recruitment of teachers as they come out of schools or as they become available? A. Yes.

Q. What has your experience been? A. My experience is that we can compete for good quality teachers if our starting salary is within $500 of the public school scale. If the differential is greater than that we suffer and the greater the differential the more we suffer.

Judge Coffin: Did you say earlier that this bill, if it be held invalid, that you would not be able to offer more than $6,000 as a starting salary?

The Witness: Yes.

Judge Coffin: But in 1969 and 1970 you did offer $6,000. Is this including funds that the bill provided for?

The Witness: No, we offered $6,000. We contracted for it certainly hoping that we would get 15 per cent from the state, but we are committed to the $6,000 whether or not we get it.

[110] Mr. Collins: We may have some further evidence on that, Your Honors, that might do violence to that answer.

[111] Judge Pettine: The maximum of six thousand is what you can offer if the Court should find it unconstitutional?

The Witness: Yes.

Mr. Collins: That is for next year, Your Honor. For next year.

Judge Pettine: What are they paying this year?

The Witness: They are paying six thousand. Could I explain that a little, please?

Judge Pettine: Yes.

The Witness: Well, we offered $6,000 this year, and we hoped that the bill would pass, although we made commitments to the $6,000 bill and it had not passed, so we are committed at $6,000 this year. If the Court finds the bill unconstitutional and we know that we will have to pay the entire committed salary for the future, then we won't be able to offer more than $6,000, because we will in addition to the problem there, the great majority of the parishes are going to have to hire at least one more lay teacher next year than they have this year, and some parishes two or three.

Judge Pettine: That other $6,000 that is now being paid, Father, is the parish paid $5100 of that?

The Witness: Well, pending the decision [112] of this Court.

Judge Pettine: I'm just wondering where the other $900 is going to come from.

The Witness: Well, it will have to come from the parishes.

Judge Coffin: Assume the bill is held constitutional, then the parish would pay $5100 and the subsidy will amount to nine?

The Witness: Yes, sir.

Judge Coffin: That isn't within $500 of the new salary scale that Providence is having.

The Witness: Well, if the bill were held constitutional we could then offer perhaps $6500, knowing we would get 15% of that from the state and then the parish contributes a little bit more, and we could keep closer to the public school scale.

Q. (By Mr. Collins) The bill doesn't help you save money, the bill just makes you more competitive? A. That's right.

Judge Coffin: If you offered $6500, knowing that you could get subsidy of 15%, this means that your parishes would be paying something like fifty-five, fifty-six or fifty-seven hundred?

The Witness: Yes, sir.

[113] Judge Coffin: You say they are having a hard time paying fifty-one?

The Witness: That's right, that's true. The parishes are still going to be in difficulties either way.

Q. They would have to increase their efforts over the present in order to approach that $500 margin beyond which you were not competitive? A. Yes, definitely.

Mr. Collins: If I may have a moment, Your Honor.

Judge Bownes: Father, while they are conferring, has there been an increase, either gradual or precipitous in the number of lay teachers versus the number of religious teachers in the parochial grammar schools?

The Witness: Oh, yes. I would call it precipitous.

Judge Bownes: And based on your own experience, do you foresee this would continue?

The Witness: Yes, I do.

Judge Bownes: Do you care to make a prediction as to whether in the immediate future, say, within the next five years, schools will be staffed almost [114] 100% by lay teachers?

The Witness: That is entirely possible. I would not like to see it happen, but it is definitely possible.

Judge Bownes: Is it fair to say that ten years ago the number of lay teachers in parochial schools, grammar schools, were greater in proportion than they are today?

The Witness: Ten years ago about 8% of our teachers were lay teachers. Most of them were in the high schools. We had, oh, gee, I think we had about fifty lay teachers in the elementary schools out of a total of about 1,000, 1200 teachers ten years ago.

Judge Bownes: So based on your previous answer that as a rule the religious teachers are better qualified as far as educational background is concerned, and this crisis, if you will call it that, or dilemma that you face is due to the fact that the religious teachers have diminished and the need for lay teachers is greatly increased?

The Witness: Yes, definitely.

Mr. Collins: I have nothing further, Your Honor.

Mr. Allen: No questions, Your Honor.

[115] Mr. Stanzler: We have nothing further of the father except for the document that we asked him to bring tomorrow.

The Witness: Yes, thank you.

Mr. Stanzler: Your Honors, now, we had indicated that counsel would get together tonight to review that handbook and we will be glad to do that with respect to certain provisions. I do feel that then I would urge that the document, Plaintiff's Exhibit 14 for Identification, be admitted now. It has been testified to by Father Mullen that if it used as a guide, that each principal has it and if there are any modifications or amendments, it would seem to me that the defendants can introduce such modifications or amendments as they have for directives. I would urge

that it be admitted into evidence. We will be glad to point out to counsel and meet with counsel, but at any rate, I believe it should be admitted.

Judge Coffin: We will hear from counsel for the intervenors and the State, but at the moment, it is inclined to allow the handbook with the understanding that if there have been changes and if you can indicate those changes through working it out with counsel for the plaintiffs, what the changes are, or if you prefer, [116] if that's the only way that you can elicit it through testimony what parts of that handbook are not—

Mr. Collins: Your Honor, please. We frankly, we are confronted with a basic disagreement with respect to the other side. I have always been of the view that the proponents of the particular proposition is obliged to put in what is right and it is not incumbent upon me when this thing is in to then begin to wonder what part of it is going to be looked upon as relevant and what is not relevant, and that's why I really wanted the other side to tell me what parts they want to rely on, and then I can tell you whether we have objection to it or whether we don't, but when a document such as this is offered, I don't know. All I do know is that some of it has been superseded, some of it never went into effect, and some of it may be superseded by practice.

Judge Bownes: Mr. Collins, as I understand the position of the plaintiffs, they want to rely on the whole document as is, isn't that your position, Mr. Stanzler?

Mr. Stanzler: Yes, that is right.

Judge Pettine: You object to the testimony of Father Mullen to the effect that some of it has changed by directives. You say you want to rely on the whole document. If some of the document has not been used in [117] the school, what is the materiality?

Mr. Stanzler: We don't know.

Judge Pettine: What do you mean you don't know? Well, what are you offering? Are you offering something

into evidence that you don't have a specific thought in mind as to part of the proof of your case?

Mr. Stanzler: Yes, Your Honor, we have read the exhibit itself and to our knowledge up to this point, or up to the point of taking the deposition, there were some changes. There were some directives that had been issued to the various principals that would modify that. Other than that, the document contains all the things that we felt should be included within it, because it speaks for itself. It has relevance as far as we are concerned to show the operation of the school.

Judge Pettine: If it's not a part of the operation of the school, how can it be relevant?

Mr. Stanzler: The point is, Your Honor, that it would seem to me that in as much as the father has testified that it is the guide, that it is used by the principal, that each principal has it, it then becomes the burden of the defendant or the intervenors or even Father Mullen to tell us which portions are not, because it seems to me that inasmuch as it has been utilized, has [118] been put forward, it was given to the principals to help run their school system, it is a guide as to the school system, therefore, it should be and certainly is admissible for the purpose for which we intended to prove that it is what the schools are operating by.

Judge Pettine: But you are offering—you are the man who is offering this document, yet you are offering it and in one breath you are saying this is the guide and we think it is relevant, and you are conceding, however, from the very witness you put on the stand that part of it is not used.

Mr. Stanzler: I'm not conceding—

Judge Pettine: Well, it's your own witness and you didn't ask that he be put on as a hostile witness. I am not accepting him as a hostile witness unless you put it on the record that you intended it as such.

Mr. Stanzler: Well, I—

Judge Coffin: We will keep Exhibit 14 in the state of suspended animation with the hope that counsel will still be able to identify what is not accepted policy and what is. It is inconceivable to ask that we should attempt to decide this case without that kind of a document, and we are not inclined to be overly technical and imposing such a burden on the plaintiffs. On the other [119] hand, we are not desirous of doing this by installments, taking the whole thing and then deleting. We still think that it would be very helpful, a very helpful duty if both sides and all three sides would attempt to give us a package that even if it isn't all agreed upon at least where it is disagreed, it will be isolated and identified. We will rule on that tomorrow. If the plaintiffs rest, it will be with the understanding that this is unfinished business.

Mr. Stanzler: Thank you, Your Honor, then we will do that. We will rest subject to that and Father Mullen's bringing us the statement that was read to the General Assembly by the representative of the diocesan schools. We rest on those conditions. Thank you very much.

Mr. Allen: I don't know whether Your Honors want to take an afternoon recess or not.

Judge Coffin: We have a fresh reporter, I think we might just as well continue.

Mr. Allen: May it please the Court, I think the question here is whether the State preserve a posture of neutrality. Now, the largest part of the State's case, to put it rather baldly, is, "Here's a paper. Read it. Make up your mind." We submit, Your Honors, that by reading Mr. Wilcox's deposition, the general administrative outline of the program, its purpose and [119A] effect become pretty clear. However, we intend to put Mr. Wilcox on briefly to clear up a few minor points which have arisen one way or another and for one reason or another, we didn't feel that we wanted to question Mr. Wilcox extensively at the time of the taking of his deposition. Basically, we want to show that it is not a foregone conclusion that

this bill benefits only Roman Catholic parochial schools. It is not a foregone conclusion from the point of view of the present effect of the law as well as a foregone conclusion of the purpose of the law.

[120] My brothers may object that this is a fluid situation and Mr. Wilcox perhaps knows more about this today than he did on February 25th when his deposition was taken. And we also want to clear up and show that this was not necessarily established in the administrative sense with anybody's particular coaching or help. This was done by the State by itself. And we thus wish to show that there has been no favoritism towards any religion, including, in the Schempp terms, a religion of secularism.

With those remarks I would like to call Mr. Wilcox.

Edward F. Wilcox, Sworn.

Direct Examination

By Mr. Allen

Q. Mr. Wilcox, will you state your name for the record? A. Edward F. Wilcox.

Q. By whom are you employed? A. Rhode Island State Department of Education.

Q. And what position do you hold there? A. I am Associate Commissioner of Education for Research and Planning.

Q. On February 25th, 1970 in the executive offices of the department were you involved in any activity which is different from your normal daily routine? A. I offered a deposition, copy of which you have in your hand.

Q. Mr. Wilcox, I will tell you that the three judges sitting [121] here probably have not had an opportunity to read your deposition but they will, so that we needn't go back over that.

Now when we took your deposition you were asked at that time whether any non-Catholic schoolteachers had qualified for a salary supplement. Is that correct? A. That is correct.

Q. How did you answer it at that time? A. I had to check my records. I asked for time to do this. I checked my records and found that at that time there had been no teachers from non-Roman Catholic schools that had applied—that were eligible.

Q. Were you asked at the time of your deposition as to the—

Judge Pettine. Mr. Allen, just for the sake of the record, when you are referring to the deposition do I assume you are referring to Plaintiffs' Exhibit 13?

Mr. Allen. No, I think it is Plaintiffs' Exhibit 3.

Judge Pettine. Whatever number it is, I think we ought to have it on the record so we will know precisely what you are referring to.

Mr. Allen. It is Plaintiffs' Exhibit 1, your Honor.

Judge Pettine. Plaintiffs' Exhibit 13 must be a letter from Mr. Wilcox then.

Mr. Allen. Yes, your Honor.

Judge Pettine. You are referring to Plaintiffs' [122] Exhibit 1.

Mr. Allen. No. 1; yes, your Honor.

Mr. Allen. I have lost—May I have the portion of the question—

(Last question, as above, read by reporter)

Q. Were you asked at the time of your deposition on February 25th as to the eligibility of teachers at the Providence Hebrew Day School? A. I believe I was.

Q. Will you tell the Court now what is the status of the teachers at the Providence Hebrew Day School? A. We have received no applications from any teachers at the Providence Hebrew Day School.

Q. Now, as I understand the mechanics of this program, Mr. Wilcox, you mailed out materials which are now in evidence as Plaintiffs' Exhibit 4, which is a letter and some forms. You mailed this out at a point last fall. Is that correct? A. I believe you are referring to the September 15th letter from Commissioner William P. Robin-

son that contained a set of forms and asking the principals of the schools to return certain forms if their teachers were to apply for a salary supplement.

Q. And was the Providence Hebrew Day School—

Mr. Allen. Strike that.

[123] Q. Was one of these letters and sets of forms, one of these packets, addressed and mailed to the Providence Hebrew Day School, if you know? A. It was.

Q. And did you receive any response to that mailing? A. Yes, I did. I talked over the phone, I believe,—I don't know the person's name—with the secretary of the Providence Hebrew Day School; and I told her if she believed that the school was eligible, to complete the form which is Form 31 NPS which has been offered in evidence and is called the summary of expenditures.

Q. And because their Honors have not yet read the deposition, what does Form 31 NPS do for the Department of Education? What is it for, briefly? A. Using that form we are able to determine the average per pupil expenditure for the second preceding year of that particular school.

Q. Why do you want to make that determination? A. Because the statute states that the average per pupil expenditure in the second preceding year of the public schools shall not be exceeded by a nonpublic school.

Q. Now did you ever receive a written reply from the Providence Hebrew Day School? A. I received the summary of expenditures. I received no correspondence from that institution.

[124] Q. That is, Form 31 NPS. A. That is correct.

Q. And was the Form 31 NPS received by you from the Providence Hebrew Day School filled out? A. It was.

[125] Q. Now, when your deposition was taken, which is now Exhibit 1 in this case, referring to Page 33 of your deposition, I want to read back a question and answer from your deposition. The question asked you by Mr. Shine was: "Now, the two independent schools you refer to do not come or did not come and do not come from

within the definition of non-public schools; is that correct?" and you answered, "The Governor Center School did not. Since no teacher applications were received from the Providence Hebrew Day School, no definite determination was made in the case of their expenditures." Now, do you want to change that answer at this point? A. No, I do not. That is the correct answer.

Q. Now, why was your determination with respect to the Providence Hebrew Day School not definitive? A. Because no application had been received from any teacher at that institution.

Q. Had you received an application from that teacher, what would you have done next? A. Using the form, I would have determined the average per pupil expenditure for all education at the school. If that amount had been below the average per pupil [126] expenditure in the second preceding year in the public schools, the teachers in that school automatically would have been eligible for a salary supplement. If the amount had exceeded the average per pupil expenditure under the statute I would have visited that school.

Q. Now, will you tell us for what purpose you would have visited the school, would you tell us that next? A. In order to determine the percentage of the expenditures at that school that were for secretarian education and the percentage of expenditures at that school for secular education.

Q. Now, why would you be interested in making that determination or allocation? A. Because the statute calls for expenditures for—I hope I am using the right term now—for secular education only.

Judge Coffin: This has been strung out a little bit. Am I right in saying that if the Hebrew Day School had sent in or a teacher had sent in an application but if the list of expenditures had indicated they were above the per pupil average, even though the expenditures looked high you would have visited the school to recheck the allocation?

[127] Mr. Allen: I can clear that up, Your Honor. There is an assumption in here that Your Honor is not aware of and that we have been operating with for several weeks. Mr. Wilcox, on form 31 NPS, what expenditures are asked to be reported by your department?

The Witness: All of the expenditures of the school for instruction, for maintenance, for operation and so forth.

Q. Well, is there any distinction made on form 31 NPS between expenditures for secretarian purposes and expenditures for secular purposes? A. There is no distinction.

Q. Is it all lumped together? A. I would assume, yes.

Q. So that if the expenses of the school computed from 31 NPS ran too high, would they be excluded from the program, would their teachers be excluded from the program necessarily at that point? A. Not at that point, no. It would be necessary for me to determine the expenditures for secular education and separately from the expenditures for secretarian education.

[128] Q. Now, have you a form 31 NPS, filed with you by the Providence Hebrew Day School? A. I have.

Q. And you are familiar with, obviously, the average per pupil expenditure in the public schools? A. I am.

Q. Now, can you tell us whether on a cursory examination of form 31NPS whether or not it is likely that teachers at the Providence Hebrew Day School might qualify? A. I would have to determine the percentage of the total expenditures for secular education. My cursory examination showed that the overall per pupil expenditure at this institution exceeded the average per pupil expenditure in the public schools on the second preceding year.

Q. But no allocation has been made on their expenditures as between secular and secretarian education? A. There has been none.

Q. So that teachers at that school might qualify; is that a fair statement? A. It is possible.

Q. Now, in establishing the administration of this program, Mr. Wilcox, you were pretty much in charge of that, [129] weren't you? A. I was delegated the responsibility to administer the program.

Q. Now, do you recall any meeting that you had in the office building in which the Department of Education is housed, the Roger Williams Building, in the basement of the building, with a Mr. Earley and Father Mullen and some other people? A. On September 3rd, 1969, there was a public hearing held in the Department of Education conference room on the commissioner's regulations governing the payment of salary supplements.

Q. And was this hearing held as a—

Mr. Allen: Well, I withdraw the question.

Q. Did you convene that hearing? A. The hearing is convened under the Administrative Practices Act of the state of Rhode Island by the Commissioner of Education.

Q. Was there ever any other meeting in the basement of the Roger Williams Building with respect to this whole program or law that you recall that Mr. Earley or Father Mullen attended? [130] A. None that I know of.

Mr. Allen: You may inquire.

Mr. Collins: I have no questions, Your Honor.

Mr. Stanzler: No questions, Your Honor.

Judge Coffin: Mr. Allen, do you have anything more at this point?

Mr. Allen: I think I rest, Your Honor.

Judge Coffin: The intervenors?

Mr. Collins: Yes, Your Honor, I would like to call Mr. Earley, please.

John R. Early,

first having been duly sworn, testified as follows:

Direct Examination

By Mr. Collins

Q. Mr. Earley, where are you employed? A. Saint Francis Xavier School.

Q. And are you the principal there? A. Yes, I am.

Judge Bownes: Mr. Collins, I think you had better get his name and address.

Q. Would you please state your full name and where you [131] live? A. John R. Earley, 5 Cumberland Road, Riverside, Rhode Island.

Q. I understand you are the principal in the school? A. Yes.

Q. Do you also teach at the school? A. Yes.

Q. What course? A. Science, mathematics, social studies.

Q. Have you applied for a salary supplement? A. Yes, sir.

Q. Do you teach a course in religion? A. No, sir.

Q. Do you inject any religious content in the courses that you teach? A. No, sir.

Q. Do you have a copy of the Handbook that has been discussed here in court today in your school? A. Yes, sir.

Q. Do you refer to it in the day-to-day operations of your school? A. No, sir.

Mr. Collins: I have nothing further, [132] Your Honor.

Mr. Allen: No questions.

Mr. Stanzler: No questions, Your Honor.

Mr. Collins: Thank you, Mr. Earley.

Judge Coffin: The court would like to ask a few questions.

Mr. Collins: I beg your pardon.

Judge Coffin: We ask questions to get a little bit more of a feel from such a man as you who is in the field. We have Father Mullen whose jurisdiction is very broad. How big is the school of which you are principal?

The Witness: We have a student body of approximately 270 children. The classroom range is from kindergarten through Grade 6.

Judge Coffin: How many teachers or how are they allocated between lay and religious teachers?

The Witness: I have seven teachers, plus myself, and they are all secular teachers.

Judge Coffin: How many teach the religion course?

[133] The Witness: Two, Your Honor.

Judge Coffin: And how much time a week does each child in your school have for a course in religion?

The Witness: The average would be four 30 minute periods during the week.

Judge Coffin: What happened to the other 30?

The Witness: Situations differ from school to school and as administrator I felt that this was sufficient in this particular area that the other 30 minutes would be better utilized in language because we happen to have an ethnic school.

Judge Coffin: How many general assemblies do you have in the course of a month?

The Witness: Usually none, Your Honor.

Judge Bownes: None?

The Witness: Usually no general assemblies for the whole school during the month.

Judge Coffin: Do you have a room capable of holding your students?

The Witness: Yes, sir, Your Honor.

Judge Coffin: So you have very few [134] assemblies.

The witness: We have had perhaps three or four assemblies over the school year so far.

Judge Coffin: What can you tell us about the decor of the classrooms?

The Witness: The school is 10 years old and it is a very well built school. The decor or decoration of the rooms is what you might say basically the same as you would expect to find in any modern elementary school. We do have a crucifix in each room as far as religious decor and also there happens to be a statute in each room.

Judge Bownes: A statute of what?

The Witness: A saint, Your Honor.

Judge Pettine: Is your school in close proximity to the church itself, is this a parish school?

The Witness: Yes.

Judge Pettine: How far are you away from the church itself?

The Witness: The closest point would be about 30 feet.

Judge Pettine: Thirty feet from the [135] church?

The Witness: Yes, Your Honor.

Judge Pettine: How do you observe religious holidays?

The Witness: Well, they would be observed, if they were to be observed at all, within the—

Judge Pettine: I suppose I should ask you do you observe religious holidays?

The Witness: No, not out of context of the actual religious program—it would be no, Your Honor. Time is not taken off from school nor is any more time taken from the school program in observance of these holidays.

Judge Pettine: How about holidays that require Mass attendance?

The Witness: We have no religious holidays in our particular parish school in which Mass is mandatory. Mass is usually available in the church prior to the starting of school and also they may have an evening Mass there at which time the children would or would not go with their parents on their own volition.

Judge Pettine: Do you start the class [136] with prayer?

The Witness: No.

Judge Pettine: No prayers are said at the beginning and end of each day?

The Witness: At the beginning of the day it is normal in each class.

Judge Pettine: Are they said individually in each class?

The Witness: Yes, Your Honor.

Judge Pettine: If I understand correctly, at the start of each day each classroom starts the day with prayer?

The Witness: Yes, Your Honor.

Judge Pettine: A lay teacher leads the students in prayer?

The Witness: This is not mandatory. In many cases the children, if the teacher happens to be in conference at that time, the children will automatically take over. You might say that the teacher would take part in the prayer, but I don't know if I could adequately define it as leading the prayers.

Judge Pettine: Are these prayers the [137] standard prayers?

The Witness: Most of them, yes, Your Honor.

Judge Pettine: They are the standard prayers recited by Catholics?

The Witness: Yes, Your Honor.

Judge Coffin: The two teachers who teach religion, they teach other subjects?

The Witness: Yes, they both do, Your Honor.

Judge Bownes: Does the parish priest visit the school regularly?

The Witness: No, Your Honor.

Judge Bownes: At any stated intervals?

The Witness: At no times, Your Honor.

Judge Coffin: If the bill were to be upheld how would this affect the composition of your teaching staff?

The Witness: Well, if the bill is upheld it would change the chief of my teaching staff at all this year and, unfortunately, we are closing this year so I cannot make any statement on the future. This is our last year.

[138] Judge Pettine: Are there any non-Catholic students in your school, if you know, of course?

The Witness: No, I don't believe we have any non-Catholics at the school. We do have one non-Catholic faculty member, however.

Judge Bownes: What subjects do you teach?

The Witness: That I teach?

Judge Bownes: That are taught in school?

The Witness: The languages, arts, reading, writing, spelling, science, mathematics, music, social studies.

Judge Bownes: Social studies, does that mean history or is that something different?

The Witness: Well, history would be incorporated into it. History and geography are parts of social studies.

Judge Bownes: Talking about history, are you talking about history of the United States, history of Europe or—

The Witness: Depending upon the class, [139] Your Honor, the grade level. For example, the sixth grade would

be on Latin American, Africa, and on various grade levels they would take various sections of the world.

Judge Coffin: Do you have a school library?

The Witness: Yes, we do.

Judge Coffin: This, I assume, would have books on every subject?

The Witness: Yes, Your Honor.

Judge Pettine: It has Catholic literature?

The Witness: Oh, yes.

Judge Pettine: You say, "Oh, yes," you mean a predominance of Catholic literature?

The Witness: No, I mean we do not have—we have all literature rather, including Catholic.

Judge Pettine: All right.

Mr. Stanzler: I just have a couple of questions.

Q. (By Mr. Stanzler) How long have you been principal of Saint Xavier's School? [140] A. This is my first year.

Q. And prior to this year where did you teach, if you did teach prior to this year? A. I was at Saint Cecilia's School in Pawtucket.

Q. How long have you been teaching in the Catholic schools? A. This is my seventh year.

Q. But you were never a principal before? A. No, sir.

Mr. Stanzler: Thank you.

Judge Coffin: There being no further questions, we appreciate your coming. Thank you very much.

Mr. Collins: Mr. Moss, please.

Alan E. Moss,

first having been duly sworn, testified as follows:

Direct Examination

By Mr. Collins

Q. Would you state your full name, please? A. Alan E. Moss.

Q. Where do you live? A. I live in Fall River, 78 Congress Street.

Q. Are you employed? A. Yes, I am.

Q. Where are you employed? [141] A. I am employed by Saint Brendan's School in Riverside.

Q. What is your educational background at the present time? A. You mean where I went to school?

Q. Yes. A. Providence College and presently attending the Extension Division.

Q. What courses do you teach at this school? A. I teach math and reading.

Q. To what grades? A. Mathematics to the fourth grade, 5 and 6, reading is the seventh grade.

Q. Do you teach a course in religion? A. No, I don't.

Q. Do you inject any religious contents into the courses that you teach? A. No, I don't.

Q. Do you happen to be a Roman Catholic? A. No, I'm not.

Q. When you were hired, was there any discussion as to your religion or lack thereof? A. No, the question wasn't asked. I stated that I was not a Catholic.

[142] Q. To whom did you say that? A. I believe it was Sister Edward.

Q. What response did you receive? A. There was no response. She just made—if she said anything—at that time she said it made no difference.

Q. Did you do any teaching last year? A. Yes, this is my third year of teaching.

Q. Where did you teach last year? A. Saint Brendan's School.

Q. Same courses? A. Last year I had science and math.

Q. What did you earn last year? A. Last year it was $4,800.

Q. What was your contract for this year? A. It said at $5100 and then the salary supplement to make it $6,000.

Q. Do you intend, Mr. Moss, to stay at this school if the salary does not remain competitive with the public schools?

Mr. Stanzler: I object.

Judge Coffin: On what basis?

Mr. Stanzler: On the basis of his intention of remaining in the school. The question [143] is really what seems to me what his present status is and the salary that he is presently achieving whether he would for some reason or another go to another school system doesn't seem to be material.

Judge Coffin: It would seem to me we are getting into, while we are liberal, I would not think that this would have too much bearing on the merits what a given person intends to do.

Mr. Collins: If I may address myself, Your Honor, the statute which we are involved here, the statute is designed to increase and maintain the quality of secular education in non-public schools. Public schools by virtue of the fact that the non-public schools cannot compete, as a result of that, lose qualified teachers. I think it does have a relationship.

Judge Bownes: Well, we have already had the testimony of Father Mullen. We covered that with Father Mullen. You covered the subject in the abstract.

Mr. Collins: I will withdraw the question. I have nothing further.

Mr. Allen. No questions.

[144] Mr. Stanzler: Excuse me a moment.

Judge Bownes: I think I said something in my remark as to the "abstract" and what I really meant was generally. I change the word to "generally."

Q. (By Mr. Stanzler) Mr. Moss, just one or two questions; you contract is at the rate of $6,000 per year with your school? A. Yes, sir.

Q. You are presently being paid at the rate of $6,000 per year? A. No, I'm being paid on the basis of the $5100.

Q. How often are you being paid? A. Weekly.

Q. And you are being paid weekly for a period of how long? A. Forty weeks.

Q. And how much do you receive each week gross? A. You mean before deductions?

Q. Yes. A. Off hand I couldn't say, I'm not sure, but after deductions it's $99.76.

Q. But you don't recall the gross amount? A. No, off hand I don't know. We only receive a check. We don't receive—that has been taken care of, I couldn't say.

[145] Q. So as you calculate it you're being paid at the rate of $5100. Are you sure? A. I don't quite understand what you mean. There is a stipulation in the contract that the difference between that $5100 and the $6,000 will come fron the state, but right now I am being paid on the basis of $5,100 and not $6,000.

Q. So whatever your gross pay, you say you are being paid that gross pay times forty weeks would equal $5100? A. Yes, sir.

Q. Would you be able to find out for us what your gross pay is? A. I could.

Q. You signed a contract in May of 1969, referring to plaintiff's exhibit 22, which is this exhibit? A. Yes, sir.

Q. In May of '69? A. Yes.

Q. Do you know whether a salary supplement was enacted at that time? Do you know whether it was or not? A. No, I couldn't say for sure. I think originally the contract was drawn up for 48 weeks, but it was changed later on. It was talked about 48 weeks but if you figured 48 weeks weekly it would come—the take-home pay was $64.00 which wasn't—

[146] Q. That was included within the contract originally? A. No, it was talked about.

Q. Are you a graduate of Providence College? A. No, I'm not. Not at the present.

Mr. Stanzler: That is all.

Redirect Examination

By Mr. Collins

Q. (By Mr. Collins) Plaintiff's exhibit No. 22 bears a date of May and that purports to be a contract. Did you sign that contract in May? A. No, I didn't.

Q. When did you sign the contract? A. I believe it was more in September.

Q. Are you presently having a dispute with the Pastor over whether you are to get $6,000 if the bill doesn't pass? A. Yes, that is originally why it was not signed in May.

Mr. Collins: I have nothing further.

Madelyn C. Law,

first having been duly sworn, testified as follows:

Direct Examination

By Mr. Collins

Q. Would you state your name please? A. Madelyn C. Law.

Q. Where do you live? A. 45 Shenandoah Road, Warwick, Rhode Island.

[147] Q. Are you employed? A. Yes, sir.

Q. Where are you employed? A. St. Timothy's School in Warwick, Rhode Island.

Q. Are you an applicant for salary supplement? A. Yes, I am.

Q. Do you teach courses or a grade? A. I teach a grade except that I also teach second grade language so that I do not teach religion to my third grade.

Q. Do you teach a course in religion? A. No, I do not.

Q. Do you inject religious contents into any of the courses that you teach? A. No, I do not.

Q. Where were you teaching last year? A. St. Theresa School in Providence.

Q. What did you earn last year? A. I came in as a substitute teacher and I think near the end od January and I was paid the substitute rate which was $100 a week before any deductions.

Mr. Collins: I have nothing further, Your Honor.

Judge Pettine: Mr. Collins, do you have a deposition 24 on this lady?

[148] Mr. Collins: No, it's her contract.

Judge Pettine: That is her contract.

Cross Examination

By Mr. Stanzler

Q. (By Mr. Stanzler) May I just see the contract, exhibit 24—

Mr. Collins: Your Honor, may I ask one further questions?

Q. (By Mr. Collins) Would you tell us your educational background please. A. I have a bachelor degree from the College of the Sacred Heart, cum laude. I have 24 credits towards my Master's at Georgetown University. I passed my oral comprehensives. I am currently writing my thesis and I will receive my Master's degree, hopefully, in September.

By Mr. Stanzler:

Q. (By Mr. Stanzler) Mrs. Law, do you teach the third grade? A. Yes, normally.

[149] Judge Coffin: They may be no need to have you talk slower or faster. Are there any more questions, gentlemen?

Cross-Examination by Mr. Stanzler

Q. Mrs. Law, you teach the third grade? A. Yes, normally, sir.

Q. But you teach language for the second grade, did I understand you correctly? A. Yes, sir.

Q. And when you teach the third grade, you teach all the subjects? A. Yes.

Q. All but religion? A. Yes.

Q. Now, you teach at the Timothy School? A. Yes, sir.

Q. You taught there last year? A. No, I taught at St. Teresa's School last year.

Q. And where is St. Teresa's School located? A. In the Olneyville section of Providence.

Q. And in the St. Timothy School, do the classrooms have crosses in them? A. Yes, there are crucifixes.

Q. And is there a cross on the outside of the building? [150] A. Well, the school building is attached to the old church, which is no longer a church, so there is a cross on the building, but I don't know whether you would call it part of the school or not, it's just a vacant hall.

Q. Now, at St. Teresa's where you taught last year, were there any crosses or crucifixes in each room? A. Yes.

Q. And there was a cross or a crucifix on the outside of the building? A. Really, I don't remember.

Q. Does St. Timothy have a library? A. Yes, we do.

Q. And that has all forms of literature? A. Yes, it does.

Q. Including Catholic literature? A. Yes, not too extensive.

Q. And this year you are being paid at the rate of $6,000 per year? That is what you are being paid at that rate? A. Yes, sir.

Q. And there is nothing in your contract which indicates any difference in the event of your receiving any salary supplement? A. No.

Q. In this state? [151] A. No.

Q. Do you happen to be a Roman Catholic? A. No.

Q. Have you ever seen this handbook? A. No.

[152] Mr. Stanzler: Thank you, that is all.

Judge Coffin: You may be excused.

William A. Hanson,

first having been duly sworn, testified as follows:

Direct Examination by Mr. Collins

Q. Would you state your full name, please? A. William A. Hanson.

Q. Where do you live, Mr. Hanson? A. Narragansett, Rhode Island.

Q. What is your educational background? A. I have a Bachelor of Arts degree from Barrington College in history and social studies, minor secondary education.

Q. Are you an applicant under the salary supplement? A. Yes, I am.

Q. Where do you teach? A. Monsignor Matthew F. Clark School.

Q. What do you teach there? A. I teach science, reading, English, spelling, physical education, art and music.

Q. Do you teach a course in religion? A. No.

Q. Do you inject any religious contents in any of the courses you teach?

[153] Q. How long have you been teaching in this school? A. Seven months.

Q. Are you married? A. Yes.

Q. What does your wife do? A. She teaches.

Q. Where? A. At the Hamilton Elementary School in North Kingstown.

Q. Is that a private school? A. It is a public school.

Q. When you started teaching this year did anybody tell you how you were supposed to operate or function? A. No, not at all.

Q. Did you ask your wife for any help? A. Yes, I did.

Mr. Collins. I have nothing further, your Honor.

Cross-examination by Mr. Stanzler

Q. Mr. Hanson, have you ever taught before? A. No, I haven't. Well,—

Q. When did you graduate from college? A. 1968.

Q. And what did you do in the year in between '68 and '69? A. The U. S. Army said that I had to fulfill my debt to them.

Q. Is the Msgr. Clarke School located in Narragansett? [154] A. No, it is not. It is in between. It is located between Narragansett and Wakefield. I think it is right on the two town lines.

Q. In teaching these various subjects which you teach do you remain in one room or do you go to the various classrooms? A. I remain in one room except for gym and maybe music or art. And then we have a utility room which we can use.

Q. Does each of the classrooms have a cross or crucifix in the Msgr. Clarke School? A. I don't know if each of the

classrooms has a cross in it. I am not sure of that. I know the gym does.

Q. The gym does? A. I think so, yes.

Q. How about your classroom? A. I hadn't noticed until Friday, but it does.

Q. And you are being paid at the rate of $6,000 per year? A. Yes, I am.

Q. And that is your contract with the school? A. Yes, sir.

Q. In the event that you are permitted to receive the salary supplement, the amount that you will receive, what would you do with that? A. It would go to my bills.

Q. It would go to your bills. In other words, you would receive that amount over and above the $6,000? [155] A. Oh, no, no. Altogether it is $6,000. The salary supplement is included in that $6,000 salary.

Q. But if you should receive the money from the State, what would you do with it? A. I don't understand.

Judge Pettine. What do you mean by that, Mr. Stanzler? Do you mean personally what would he do with it?

Mr. Stanzler. I am just trying to find out whether or not he would return it to the school.

Judge Pettine. Why don't you ask him that?

A. (Continuing) Return it to the school?

Q. Yes. A. In which way?

Q. Would you return it to the parish principal? A. I don't understand.

Q. Don't you have an understanding with the principal of the school, with respect to the receipt of this money, as to whether or not you would return it if you received it from the State? A. No.

Q. No understanding whatsoever? A. No, I don't think so. Not that I know of, no.

Q. Did you ever discuss it with him? A. No.

Q. So that you would be receiving this money from the State over [156] and above the $6,000 per year. Is that your testimony? A. No, not that I understand; no. I think it is $6,000. That includes the State's subsidy. I am not sure if it does. I was listening to the other testimony about the contract, and I must admit I haven't read mine too well.

Q. But you are presently receiving payments at the rate of $6,000 a year? A. Yes.

Mr. Stanzler. That is all.

Judge Pettine. In other words, I think what you are asking is under the Act the money would be paid directly to him, and would he retain it or return it.

Mr. Stanzler. That is correct.

Judge Pettine. Do you have any understanding about that, Mr. Hanson?

The Witness. No, not that I know of, no.

Judge Coffin. You may be excused. Thank you.

The Witness. Thank you.

Mr. Collins. Your Honors, in view of the invitation this morning, there are a number of witnesses that I could put on to the same effect. At this stage, in view of that, I would suggest that Mr. Shealey, were he called to testify, would testify that he is a graduate of Boston University and Boston University Law School; that he is an applicant; that he teaches in one of these schools; that he doesn't teach a [157] course in religion and he doesn't inject religion in any of his courses; and, presumably, would testify in respect to many of the questions asked by the Court and also by the others probably the same way. There is no doubt, your Honors, that there are crucifixes, et cetera.

The same is true of Mr. McElroy who is an applicant. He would testify that he teaches in one of these schools; he teaches secular subjects; he teaches them in a secular way. He doesn't happen to be a Catholic. I think he also would testify he didn't know anything about the handbook.

And, finally, Miss Walter would testify that she is an applicant; that she teaches in one of these schools. I believe she teaches just mathematics—just mathematics. She doesn't happen to be a Catholic. She doesn't teach a course in religion and doesn't inject religion in any of the courses she does teach. And I don't believe she knows anything about the handbook either. She would testify that way, and her cross-examination would be the same thing.

With that, your Honors, the intervenor-defendants rest.

Judge Coffin. The Court appreciates, Mr. Collins,—

Mr. Collins. Excuse me.

Judge Coffin. —your fulfilling the request this morning.

Mr. Collins. I beg your pardon. We do not rest, your Honor.

[158] I have a stipulation with respect to the intervenor-parents:

"It is agreed and stipulated by and between the attorneys for the parties to this action that, if called to testify at the trial of this action, Cornelius A. and Margaret-Mary Cummiskey, two of the several Intervenor-Defendants in this action, would testify substantially as follows: * * * "

And the stipulation then goes on to recite how and what they would testify to.

And I would ask that this be marked as Intervenor— Or may we file it?

Judge Coffin. Mr. Collins, the Court feels that both the stipulation received this morning and this stipulation should be part of the evidence and marked as exhibits; the stipulation this morning being designated Stipulation A and the stipulation you have just introduced being Stipulation B. And both are in evidence.

(Stipulation re depositions of Edward F. Wilcox and John R. Earley marked Stipulation A; stipulation re Intervenor-parents, Cornelius A. and Margaret-Mary Cummiskey marked Stipulation B)

[159] Mr. Collins. Fine, your Honor. I have three extra copies, if the Court would—

And for the second time, your Honors, I would like to rest on behalf of the intervenor-defendants.

Judge Coffin. Does that conclude the evidence except for the supplementing of the record tomorrow; Exhibit 14 and the catalogue if Father Mullen is able to bring that, and the diocesan statement?

Would counsel after we recess come to the bench for a brief conference? I haven't consulted with my colleagues but I would assume that counsel would prefer not to com-

mence argument now but, rather, to begin that in the morning.

Mr. Pfeffer. Yes, your Honor.

Judge Coffin. And that has worked out as well. It gives counsel time to reflect. The Court will undertake to read the depositions tonight; at least, as many as reason allows. And we will convene in the morning at ten. I don't think there would be any reason for convening earlier. It would seem to me that ten would give us adequate time in the morning for as much argument as counsel would like.

Mr. Pfeffer. Yes, your Honor. We see no reason for coming in earlier.

Judge Coffin. So we will convene at ten, and the Court would like to see counsel at the bench.

Mr. Stanzler. May I just interject one thing? I [160] have been requested by an attorney sitting in the rear of the room whose name is Frederick Salisbury that he would like to appear and offer a brief, amicus curiae. Mr. Frederick Salisbury. I don't know if this is the proper time to do that or at the conclusion of the case but he would like, on behalf of his organization,—

Judge Pettine. Is he a member of the Rhode Island Bar?

Mr. Stanzler. No, he is not.

Judge Pettine. He is a member of what Bar?

Mr. Stanzler. I think he is a member of the Washington, D. C. Bar. Mr. Salisbury.

Judge Coffin. Mr. Stanzler, the Court will accept a motion for Mr. Salisbury to appear as amicus for the purpose of filing a brief. It would be subject to the same time requirements as the rest of you.

Mr. Stanzler. Mr. Salisbury is in the room and I will advise him of that.

Judge Coffin. Would counsel approach the bench?

(Bench conference)

(Adjourned at 4:25 p.m. until Thursday, March 19, 1970, at 10:00 a.m.)

EXCERPTS FROM TESTIMONY GIVEN AT HEARING BEFORE THREE-JUDGE COURT

Proceedings of March 19, 1970

* * *

[1] Judge Coffin: Before argument commences, gentlemen, we have some unfinished business from yesterday.

Mr. Stanzler: Yes, Your Honor. I would first like to offer the statement that Father Mullen had prepared and had read on his behalf to the General Assembly. We have that now. We have some copies prepared. I ask that it be marked.

The Clerk: That will be Plaintiff's Exhibit 27, Your Honor.

Judge Coffin: This may be marked Plaintiff's Exhibit 27.

Mr. Allen: Your Honor, I anticipate your ruling, but may my objection be noted? I think it is a standing objection in any event.

Judge Coffin: This is the diocesan statement that we talked about yesterday?

Mr. Stanzler: Yes, Your Honor.

Judge Coffin: Now, this is not Father Mullen's personal beliefs.

Mr. Stanzler: This is a statement that was read by Father Mullen for the Diocesan School Board to the Committee of the General Assembly that was considering the passage of the bill.

[2] Judge Coffin: And you object, Mr. Allen?

Mr. Allen: Yes, Your Honor, on the grounds of the McCray and also on the analysis of Mr. Justice Frankfurter in McGowan vs. Maryland on this point.

Judge Coffin: Yesterday when we considered Father Mullen's personal beliefs, we excluded that, then learned that there was a diocesan statement. There being objection, however, the Court rules that technically this is not admissible, even under our fairly liberal scope. We can see a difference between one testimony educed before a state hearing and a congressional hearing which has all the testi-

mony which is printed and considered by the congress as it deliberates. Therefore, we exclude this exhibit.

Mr. Stanzler: Very well, Your Honor. Before proceeding to the discussion of petitioner's Exhibit 14 marked for identification, I would like to make our position known on another point. In conference yesterday and at a bench conference the issue of the temporary restraining order was raised. After the conference of yesterday, counsel for the plaintiffs and in conjunction with consideration with the plaintiffs and a discussion, generally, by the plaintiffs of our position and in light of the testimony of Father Mullen concerning the plans for [3] the school year for the parochial, Catholic parochial schools, it is the position of the plaintiff and the position of counsel at this point that we have no objection to the vacating of the restraining order. With respect to the handbook, Plaintiff's Exhibit 14 for Identification, counsel did meet last night. I think if I may refer to Mr. Collins and Mr. Pfeffer, they will go into the various points that have been agreed upon page by page or item by item.

Mr. Pfeffer: Your Honor, we worked last night through the lunch hour and we have reached somewhat of an agreement. Mr. Collins is here to correct me if I don't accurately relay it. First, the plaintiffs still urge that the document as a whole is admissible. It's relevant and admissible. In respect to those parts of the document which the defense contends are no longer in effect, where indeed, perhaps, have never been in effect, we agree as follows: the written directives testified to by Father Mullen which have been sent to all the school principals which are now being duplicated in Mr. Stanzler's office so there will be enough copies, they will be introduced into evidence, perhaps as a supplementary exhibit to the handbook, and to the extent that anything in those directives is inconsistent with anything in the [4] handbook, to that extent, the directives supersede the relevant position in the handbook. Now, to the extent that they do not, it is our agreement, our stipulation, that a number of specific paragraphs or sentences

in the handbook which will be elicited by Mr. Collins, here, he has the list and we have a list here. They will be read into the record with the understanding that if Father Mullen were called he would testify that although these have never been formally repealed or superseded by any written document, nevertheless, they are not now in effect or not being carried out. Is that a correct statement, Mr. Collins?

Mr. Collins: Or perhaps may never be.

Mr. Pfeffer: Is that correct?

Mr. Collins: Yes.

Mr. Allen: Yes.

Mr. Pfeffer: This is the stipulation which we have agreed to. Now Mr. Collins will go over it, please.

[5] Mr. Collins. I will merely speak of the pages where there are alterations.

Page 1—Oh, yes, I have extra copies if the Court would want a copy too. I, first of all, hope, your Honors, that all the pages are in that book. We have discovered many times there are pages that are missing.

Page 1, the bottom of that page, item C. There probably is a copy in every principal's office. I have no idea whether there is one in the convent. And the testimony shows there is not one in every classroom.

Page 2, the top of the page, the sentence reads:

"The Diocesan School Board, with the Bishop presiding, * * *."

The fact of the matter is he doesn't and hasn't.

Judge Bownes. He does not?

Mr. Collins. He does not.

The second paragraph has never happened.

Down at the bottom of page 2 there is a line that says:

"The instructions of the Diocesan Superintendent of Schools must be faithfully and accurately observed at all times."

Father Mullen says that that would be very nice but he has serious doubts about whether that is true.

On page 3, item B, the last clause of item B, speaks of a Diocesan Honor Society. That is defunct. I don't know [6] for how long but I think for some time.

Also on page 3, under item C, IV, that is not so.

On page 4, item IX, we just have a question mark. I don't know whether it happens or doesn't happen. No one seems to know. Item X has never happened.

Judge Pettine. Which page is this, please?

Mr. Collins. Page 4; X on page 4.

On page 5, under the heading "Diocesan and Community Supervisors" we merely have question marks beside the first paragraph and paragraph A. We really don't know whether that is carried out or what happens.

On page 6, item E and item F have never been observed.

On page 7, under B IX, the answer to that is no, there is no such thing as regular faculty meetings. There obviously are faculty meetings but—

On page 8—There is no difference with respect to page 8. However, on page 8 there is a quote from an encyclical of Pius XI that, I believe, came out in 1925 or '27 or '29. We have informed the other side that that encyclical is not binding and there is no evidence with respect to it. But the fact of the matter is it was never followed in this country anyway.

Mr. Pfeffer: Your Honor please, we don't concede to that last qualification. We believe that the encyclical has been in effect in this country, and there is a tremendous [7] amount of literature to show that it has been. We will accept the statement to the effect Father Mullen does not consider it binding.

Mr. Collins. If I may, your Honor, I specifically pointed out this to you last night, Mr. Pfeffer, because there is not one jot of evidence with respect to the encyclical. This Court is going to be concerned with what the facts are, properly supported. And I wanted him to know that that was our position. So I don't accept the qualification that he—I don't wish to accept the qualification that he offers.

Judge Bownes. As I understand it, what you are say-

ing. Mr. Collins, is if Father Mullen were testifying, he would say this quotation is not binding, and, further, that it is not applicable today. Is that correct?

Mr. Collins. No. As a matter of fact, I have no quarrel with this particular thing. I wanted my adversaries to know that even though this was in here, that any other portion of the encyclical was not binding, that they would not thereafter come in and write a brief that the encyclical over here said this and the encyclical over here said that. I am saying that part over here is not binding. And the only way we can know what portion of that encyclical, if any, is relevant to this case is to put someone on who has something to do with these schools.

[8] Judge Bownes. What do you say to the quotation?

Mr. Collins. Fine! But I merely want the Court and the other side to know that.

On page 9, item C is not so. On page 9, under 8, item A, sometimes teachers are interviewed by Father Mullen's office and sometimes they are not, as the testimony has disclosed. He would like it if they all were. I guess we settled upon the expression, "It is a hope more than a reality."

On page 10, at the top of the page, II, the same is true there. It is a hope rather than a reality.

On page 13, under D I, apparently that has not been in effect.

Judge Bownes. You mean the quotation is not in effect?

Mr. Collins. Yes, under D I, "Summer retreats should not be scheduled."

Mr. Pfeffer: Your Honor, I think that the understanding is that the only part of page 13 which is accepted, which is not in effect, is D I. That was our understanding.

Mr. Collins. Right. On page 14, at the top of the page, item IV, that has not been in effect.

Page 15, item 4, "Faculty Meetings." Theer again faculty meetings are held but it is not on a regular monthly basis.

[9] On page 16, under 8, "Religious Instruction," item D, that has never been in effect.

Judge Pettine. What was that last, please?

Mr. Collins. Page 16, under 8, item No. D, "Effective September, 1966," is the way it begins. Also, on page 16, item 9, "Religious Activities," the second sentence, "* * * the manner in which the curriculum is taught, * * *" in some respects never was in effect; and those where it was, it is not so any more.

[10] Mr. Collins: Page 19—well, I don't think there is anything on 19 you are interested in.

Mr. Shine: Page 22 is the next one.

Mr. Collins: Page 22, Item C (IV) that has never been in effect. I think that is one the other side will agree with me has indeed never been in effect.

Page 24 and Page 25, is there anything you are interested in?

Mr. Pfeffer: No.

Mr. Collins: Page 25 under "Physical Education," I think we all agree that if there is a diocesan syllabus for physical education there isn't one.

Judge Coffin: No syllabus?

Mr. Collins: That's right, there is not.

Page 27, under "Correspondence," Item C, it states, "All correspondence to the state Department of Education must be channeled through the Diocesan School Office." That has never been so. On Page 29 under "Guidance," how much, if any, guidance there is at the elementary level is pretty small.

Page 30 under Item 32, "Mission Program," [11] the last sentence, "This is especially true in the social sciences as well as religion," that has never been in effect.

Judge Bownes: Where are you now?

Mr. Collins: Page 30 under "Mission Program." The clause, "This is especially true in the social sciences," that has never been in effect.

On Page 39, the item "Daily Prayers," that is not followed. The fact of the matter is that the prayers are said

probably in the morning and I gather in some instances at the end of the day.

Page 41, there never has been a lesson plan book, at the top of the page, Item 9, lesson plan book.

Judge Coffin: Continue.

Mr. Collins: There are a number of other changes I am skipping over that have nothing to do, I am sure, with the issue.

Page 54. I have skipped over a lot of things in between. I don't think any of them have anything to do with the issue. Page 54, under "Awards," Item 4, "Diocesan Honor Society." As stated earlier, that is defunct.

[12] Under the Appendix C on Page 63—

Judge Pettine: Did you say 53?

Mr. Collins: 63. Your Honors will notice the contract is supposed to be written. Your Honors, perhaps, have already observed there are many kinds of contracts used.

Page 66, 67, obviously that's out of date. That has to do with $3,000 for teachers.

There are certain other items Your Honors asked of Mr. Moss who was testifying yesterday, how he was being paid. He is the gentleman that said, "I don't know my gross pay but I know my take home." He came in this morning and gave me the indication that he is paid $127.50 gross pay every week for 40 weeks. According to my arithmetic, that figures out to $5100 a year. His contract reads $6,000. He is being paid at the rate of $5100.

Your Honors also asked for curriculums with respect to schools. I have obtained that and I will offer it.

Judge Bownes: 28.

Judge Coffin: This will be marked Intervenor Defendants' Exhibit A.

[13] Mr. Allen: If Your Honor please, before we leave the Handbook entirely, I have no objection—

Judge Coffin: Just a moment, Mr. Allen. This has been offered and I assume there is no objection and it may be admitted as Intervenor Defendants' Exhibit A.

Judge Bownes has asked me to ask counsel to clarify the meaning of the figures in the columns. We assume the numbers refer to minutes per week.

Mr. Collins: Yes, Your Honor.

Mr. Allen: Your Honors, going back over the Handbook, I participated in the analysis which has just been read to the court. I concur in it. I would like to note for the court that on Page 27 of the Handbook there is an item, Item Number 27, "Officially Adopted Textbooks." I think the court can take judicial notice that the state has adopted an Allen-type statute which was approved by our Supreme Court in the Bowerman case cited in my brief and that would necessarily and by operation of law supersede portions of Section 27 on Page 27.

Mr. Pfeffer: One further clarification. The Handbook, including those items on which there is no [14] dispute. uses the word "Ordinary." I think for the record it should appear that the word "Ordinary" means the bishop who is presiding and who is the chief ecclesiastical officer of the diocese.

Mr. Collins: You embarrass me, yes.

Judge Coffin: That is the Ordinary, the bishop of the diocese.

Mr. Pfeffer: Sometimes there is more than one bishop. There is an auxiliary bishop. It means the chief ecclesiastical bishop. I am not a Catholic, but I know—

Mr. Collins: You can fool me.

There is one final item, Your Honor. If Father Mullen were called back to testify he would testify that the school day in the Roman Catholic parochial schools is one-half hour longer than the minimum school day prescribed by the Rhode Island Compulsory Attendance Law so as to accommodate the teaching of religious instruction for one-half hour.

[15] Mr. Stanzler: In view of all these statements concerning the handbook we would move admission of the handbook as a full exhibit subject to the statements of counsel and the reservations that were made and with the

addition of the directives which should be here shortly, which we can offer as one full additional exhibit when they arrive.

Judge Coffin: Exhibit 14 may be admitted subject to your qualification and the directives which will be received, Mr. Clerk, will be a supplement to Exhibit 14.

The Clerk: 14A, Your Honor, call it?

Judge Coffin: Yes, 14A. The Court wishes to express its appreciation to all counsel for their after-hours cooperation in accomplishing the proper assessments or the proper definition of the present handbook. The Court responds to Mr. Stanzler's or Mr. Pfeffer's opening remarks with regard to the temporary restraining order. The Court takes it that the State has no objection to the lifting of the order and that all counsel are agreed, is that correct? Mr. Allen?

Mr. Allen: I'm delighted, Your Honor, yes.

Judge Coffin: Not withstanding, there may be problems if things are done which have to be undone.

[16] Mr. Allen: I think I can say that won't be my problem.

Judge Coffin: Therefore, the Court announces that Judge Pettine's temporary restraining order will expire as of the close of business today. Now we approach the argument stage, and we have not discussed the order in which counsel desires to argue.

Mr. Allen: Your Honor, please, there is one small item of business left before we close the case. I have discussed this with Mr. Stanzler and we are a little unclear on the law. Certainly interrogatories were posed to plaintiffs on matters involving the facts of their standing. Mr. Stanzler believes they are, in fact, the original answers have been filed with the Court. Mr. Stanzler believes they are now part of the record of this case. My understanding of the rules is that at the present time they are not evidence, so if the Court rules that they are part of the record of this case, then I have no further business. If the Court rules they are not part of the record, not evidentiary, I would

move at this time, I wouldn't—I withdraw that—I would ask my brother, Mr. Stanzler to stipulate that if called and asked the questions that were posed to them in the interrogatories that the several plaintiffs would answer the questions as disclosed [17] in their answers to interrogatories filed.

Judge Coffin: Why isn't the clean solution to offer the interrogatories as evidence in the case? Why isn't that the clean solution?

Mr. Stanzler: We have no objection, Your Honor. We stipulated to the essence of those facts in an earlier stipulation and it's a written stipulation.

Judge Coffin: Does that not cover it, Mr. Allen, the earlier stipulation?

Mr. Allen: No, Your Honor, in the sense that the interrogatories asked for taxes paid and that those dollar amounts are not covered by the stipulation, but are covered by the answers to the interrogatories.

Mr. Stanzler: I would only say that if my brother says that if the plaintiffs did testify they would so testify, we will abide by the ruling of the Court with respect to whether the Court wants to admit the interrogatories and the answers into evidence.

Judge Coffin: You are not objecting to the use of the interrogatories?

Mr. Stanzler: Not at all, Your Honor.

Judge Coffin: Perhaps even though there has been a stipulation, perhaps the interrogatories should be introduced and marked as defendant exhibits.

[18] Mr. Allen: I will offer them as respondents' or defendants' exhibits A, B, C, D and E.

Judge Coffin: Do you have them?

Mr. Allen: They are in the record.

The Clerk: There are five here, Your Honor. I will marke them A, B, C, D and E.

Judge Coffin: All right, thank you.

The Clerk: Mr. Allen has handed me one set of interrogatories entitled "Defendant Robinson's Interroga-

tories," which is directed to each and every plaintiff. Shall I mark that F?

Judge Coffin: Is this the same kind of an interrogatory?

Mr. Allen: Those are the questions to which the five exhibits are the responses.

Judge Coffin: The questions to the interrogatories addressed to all of the plaintiffs will be marked Defendant's Exhibit A and the responses will be Exhibits B through F.

(Questions to interrogatories introduced and marked Plaintiff's Exhibit A—Responses to interrogatories marked Plaintiff's Exhibits B through F)

Plaintiffs' Exhibit No. 1

[Deposition of Edward F. Wilcox,
Associate Commissioner of Education]

* * *

[1] EDWARD F. WILCOX

first having been duly sworn, testified as follows:

Examination by Mr. Shine

Q.1. What is your name, sir? A. Edward F. Wilcox.

Q.2. What is your position? A. I am Associate Commissioner of Education for Research and Planning in the Rhode Island Department of Education.

Q.3. How long have you had that job, sir? A. I have held that job since July 1st, 1963.

Q.4. Were you connected with the Department of Education prior to that time? A. Prior to that I was Associate Commissioner of Education for Instructional Services and I held that position from July 1st, 1959.

Q.5. Now, are you familiar with the so-called salary supplement law for non-public school teachers? A. I am.

Q.6. Now, in your capacity as Associate Commissioner, is it your responsibility to administer this law? A. I was delegated by the Commissioner of Education to develop the forms necessary for the law's administration [2] and to accept applications, determine eligibility and prepare the necessary papers for transmission to the State Controller.

Q.7. Is it fair to say that from the standpoint of the Department of Education you are in charge of the administration of this law? A. That seems to be a fair statement.

Q.8. Now, this is the law that was passed in the spring of 1969 by the Rhode Island General Assembly; is that correct? A. Yes.

Q.9. Now, under the law do you have authorization to engage a special staff for the administration of this law? A. Would you repeat the question?

(Whereupon pending question was read by the reporter)

The Witness: As I understand it, there are no administrative provisions in the act except to direct the Commissioner of Education to perform certain actions under the law.

Q.10. So that as far as you know there is no special funding for purposes of administering the law; is that correct? [3] A. I know of no special funding for this purpose.

Q.11. Now, how many people in the Department of Education would you say have been involved in working on the administration of this law, sir? A. To a greater or lesser extent, the Commissioner of Education, myself, a clerk-stenographer, a clerk-typist, and the Chief of Administrative Services, all on a part-time basis, of course.

Q.12. Now, when did you first undertake to carry out the administration of this law after it was passed? A. Approximately July 1st, 1969.

Q.13. And at that time what steps did you take in that connection? A. Under the direction of the Commissioner, I began to prepare drafts of proposed regulations for him to examine and asked for revisions and to, in the end, develop a set of regulations under the act.

Q.14. And were those regulations subsequently adopted by the Commissioner under the act? A. A set of regulations was adopted by the Commissioner, the exact date of which I do not know.

Q.15. Do you have a copy of those regulations?

(Whereupon witness handed a stapled [4] document to Mr. Shine)

Q.16. And this three-page document you have just handed me, Mr. Wilcox, constitutes the regulations which were

adopted by the Commissioner under this law; is that correct? A. That is correct.

Mr. Shine: I would ask they be marked as plaintiffs' exhibit.

(Whereupon three-page document, regulations of the Commissioner of Education, was marked as Plaintiffs' Exhibit No. 1)

Q.17. Do you, sir, have a copy of the statute as it was passed? A. I have a copy of what I suspect is it. It is H 1765, Substitute A.

Q.18. As far as you know, that is the form in which the law was passed; is that right? A. Yes.

Q.19. There appears to be handwriting at the top of this document which says, "Chapter 246, P.L. 1969;" is that your writing, sir? A. That is my writing. All of the notes on it are my writing.

[5] Mr. Shine: I would ask this be marked Plaintiffs' Exhibit 2.

(Whereupon a photostatic copy of H 1765 A, previously adverted to by the witness, was marked as Plaintiffs' Exhibit No. 2)

Q.20. Now, in connection with having these regulations approved, were they submitted to any parties in interest before they were approved by the Commissioner, by you or by the Department of Education?

Mr. Allen: I object. I do not understand the intent of the question or the thrust of the question.

Mr. Shine: Do you understand?

The Witness: I don't understand the question.

Q.21. The question is: between the time you started to work on these regulations and the time that the regulations were approved by the Commissioner, did you or the Department of Education submit the proposed regulations to anyone for consideration by them? A. Not that I know of.

Q.22. Was there a hearing on the regulations? A. There was a hearing held on September 3rd in the [6] downstairs conference room.

Q.23. And was there notice published of that hearing, sir? A. I would assume that there was. It was under the Administrative Procedures Act. Of necessity, there must be a notice published.

Q.24. And other than that possible notice that was given, you know of no other parties to whom this regulation was submitted for consideration or suggestion? A. I hesitate because I may have conferred with other members of the department.

Q.25. But was there anyone else outside of the department with whom you conferred regarding these regulations? A. I cannot recall.

Q.26. Was there anyone else in the Department of Education who had responsibility for assisting with the formulation of these regulations or was this your sole responsibility? A. It is the usual procedure—I cannot say what the Commissioner does when I submit a draft of something for his consideration. He may very well ask other members of the department, but I would not necessarily be aware of it.

Q.27. Now, subsequent to your working on these regulations, [7] what steps did you take in connection with the administration of the law? A. I held a meeting with the State Controller and members of his staff, a representative from the Division of Methods—and I am trying to find other members. The members present were Mr. Charles Hill, Mr. Peter Mazzeo, Mr. Donald Taft, who represented Mr. John Cicillene, the head of the Division of Methods, Mr. Fred Andreozzi, and myself. It is necessary under state regulations to involve the Division of Methods when forms of any type are prepared and it was for this purpose that the meeting was held and also to seek the advice of the State Controller on what items might of necessity be included in the forms so that his accountability responsibilty would be taken care of.

Q.28. Were these all state employees who were at this meeting? A. Yes, they were.

Q.29. And subsequent to that meeting, what procedures did you follow, what steps did you take? A. I drafted a set of preliminary forms. In fact, the first draft was done on June 28, 1969. I started work [8] July 1st, but the first draft of forms was done on June 28. The first revision of that draft was on July 3rd. Only July 11th I submitted the forms designed to the members of that group with whom I met and apparently that was the final draft of the forms that were prepared and subsequently used for purposes of the act.

Q.30. Did you consult with others regarding the forms to be used here that you have just described you prepared? A. I am certain that I consulted with the Commissioner of Education. I am certain that if there was anything in the draft documents that did not meet state specifications I would have been so notified by the people in that group who also had responsibilities for seeing to it that the accountability factor was taken care of.

Q.31. Did you consult, with respect to these forms, with anyone outside of the Department of Education? A. Not that I know of.

Q.32. Do you know if Commissioner Robinson did? A. I have no idea.

Q.33. Thereafter, what further action did you take in connection with the administration of the law? A. Well, there was a hearing, as I noted, on September 3rd. [9] As a result of the hearing, the final draft of the regulations was submitted to the Commissioner and, as I say, I don't know exactly upon which date he approved these regulations.

Q.34. Then what followed with respect to administration? A. On September 15th a letter from the Commissioner of Education to the principals of non-public schools was directed. Do you wish a copy of this?

Q.35. Were there enclosures with that? A. There were enclosures.

Mr. Shine: May I make the suggestion—could you hand me the letter with the enclosures attached to it so we can see exactly what was sent out?

Q.36. You have now handed me a letter under Commissioner Robinson's stationery, dated September 15, 1969, addressed to "Principals of Non-Public Schools," attached to which are four additional enclosures; is that right? A. That is correct.

Q.37. Is that the material that was mailed out by your department under this law on September 15, 1969? A. That is the material that I directed to be distributed.

Q.38. And was it so distributed? A. I would assume that it was under the direction I gave [10] my staff, the direction to do this. I assume that it was done.

Mr. Shine: I would ask that this letter with the enclosures be marked as Plaintiffs' Exhibit.

Mr. Allen: I have no objection.

(Whereupon letter dated September 15, 1969, from William P. Robinson, Jr. to Principals of Non-Public Schools, was marked as Plaintiffs' Exhibit No. 3)

Q.39. Now, Mr. Wilcox, Plaintiffs' Exhibit 3, which you have just described, that was sent, according to your testimony, to the Principals of the Non-Public Schools; is that correct? A. Yes.

Q.40. It was not sent to teachers in the non-public schools, was it? A. No, it was not.

Q.41. Was there any material sent by your department on September 15th, 1969, directly to the teachers in the non-public schools? A. Not that I am aware of. It did not go out under my direction.

[11] Q.42. Is it likely that it would have gone out under someone else's direction, sir? A. I have no idea.

Q.43. Well, you were in charge of this program, weren't you? A. Yes.

Q.44. Is it not probable that anything that went out would go out under your direction and your direction only, sir?

A. I cannot speak for the Commissioner or his staff. This material, as noted, was a Commissioner's letter.

Q.45. Who prepared it? A. I imagine I did.

Q.46. You were in charge of the program; is that right? A. I am in charge of the program.

Q.47. You directed that these materials be sent? A. Be sent to the principals of the non-public schools.

Q.48. But you had no materials sent to the teachers at that time? A. There were no materials sent to the teachers at this time.

Q.49.And you know of no other materials that were sent? A. I know of no other materials that were sent directly to teachers.

[12] Q.50. Now, one of the forms that was sent out, sir, is contained in Plaintiffs' Exhibit 3 calls for certain financial information from the non-public schools; is that correct, sir? A. That is correct.

Q.51. Now, what was the purpose of your requesting that information, sir? A. There is a section in the act that states that to be an eligible non-public school the per pupil expenditure in average daily membership must not exceed the average per pupil expenditure in the public schools for the second preceding year in the same grades.

Q.52. Is that the entire requirement of the statute that you have just referred to on that point, have you read those words from the statute, sir? A. No, I did not. I read them from my memory. If you would care for me to read Provision 16-49-2 under "Definitions"—

Mr. Shine: Fifty-one.

This is what it says here, 16-51-2, "Definitions." The first definition: "Non-Public School. Except such schools whose annual per student expenditure for secular education equals or exceeds the [13] average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations as determined by the Commissioner of Education."

Q.53. So that it was in order to comply with that requirement of the statute or to get information as to that provision of the statute that you sent out this material? A. That's correct.

Q.54. Seeking financial information on the non-public school; is that correct, sir? A. That is correct.

Q.55. Now, as a result of your sending through these forms, were various materials returned to you by the non-public schools as a result of your request? A. Many non-public schools returned completed Form 31 NPS.

Mr. Allen: Mr. Shine, at this time I would suggest that a Xerox copy of Pages 1306 through 1311 of the Public Laws of Rhode Island, January Session, 1969, showing Chapter 246, as enacted, be substituted for Plaintiffs' Exhibit 2.

Mr. Shine: I have no objection. I am agreeable to that.

[14] Q.56. Now, I take it that based upon the materials that were returned to you by the non-public schools in accordance with your request, you then determined what teachers and what schools were qualified for this assistance; is that correct, sir? A. Yes.

Q.57. Now, when these materials came back, in order to obtain consideration by you, was it not necessary that the financial information that was requested be supplied by the schools? A. This was so supplied.

Q.58. Now, did you examine the financial material and information that was provided you by the non-public schools that responded in each case? A. I did.

Q.59. And did you determine from that information what schools and, accordingly, what teachers in those schools were qualified for this assistance? A. Yes.

Q.60. And did you do that based upon the financial information that was supplied in accordance with the language you have just read to us from the statute? A. Yes.

[15] Q.61. Now, directing your attention to the statute, I believe the statute excludes from the definition of non-public schools "schools whose annual per student expendi-

ture for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding year for school operations as determined by the Commissioner of Education." That is the language of the statute; is that right? A. If you read directly from the statute, yes.

Q.62. Now, did these forms that were returned to you provide you with sufficient information to determine the annual per student expenditure for secular education by the applicants that were applying here? A. Actually, no. It provided the total expenditure and it was determined that no eligible school's expenditure exceeded the public school expenditure, so we more than obtained—I mean, we obtained more than the necessary information.

Q.63. You say it was determined that no school's per pupil expenditure for secular education exceeded the public school's expenditure; is that what you are saying? A. No. I said no expenditures exceeded it because the [16] form does not make a request for expenditure for secular education only.

Q.64. In other words, your forms do not request that information as to what was spent per pupil for secular education? A. It does not.

Q.65. It does not request that information? A. It does not.

Q.66. Accordingly, you did not have that information when it came to determining what schools and what teachers were qualified; is that right? A. On the otherhand—

Mr. Shine: Excuse me, is that correct:

The Witness: Yes.

Mr. Shine: All right. Go ahead. Did you want to explain your answer?

The Witness: On the otherhand, the financial information that I did receive applied to the per pupil expenditure for public schools and still qualified the schools as eligible non-public schools.

Q.67. Well, when the statute excludes schools who have a certain annual per pupil expenditure for secular [17] education, don't you feel it is necessary to determine what the annual per pupil student expenditure is for secular education for each school who wants to apply to determine whether or not it is qualified, doesn't the statute require that?

Mr. Allen: Objection. You may answer.

The Witness: The statute requires that expenditures for secular education not exceed, but our forms were designed in such a way that they included all education and it was determined that qualifying schools did not exceed the public school expenditure for all their education.

Q.68. You think that your forms and the way you have administered the statute in this respect complies with the statute?

Mr. Allen: Objection. You may answer.

The Witness: I believe so.

Q.69. That you made no determination as to each applying school's annual per pupil expenditure for secular education; is that right? A. No.

Q.70. And requested no such evidence from non-public schools? A. We requested no such information.

[18] Q.71. Did you have any communications subsequent to September 15, 1969, with the non-public schools in general as opposed to following individual inquiries? A. Yes. I had been in communication with various principals of non-public schools and the Diocesan Superintendent of Schools.

Q. Who is that, sir? A. Father Mullen, and I also met with the principals of the Diocesan schools prior to the opening of school to describe the operation of the act.

Q.73. Is that Father Mullen? A. Not only Father Mullen, but the principals of all of the Diocesan schools.

Q.74. How many people are you talking about? A. I would imagine that present were not only pastors and principals, there might have been a couple of hundred.

Q.75. Where did that meeting take place, sir? A. It took place at the Cathedral complex.

Q.76. What Cathedral is that? A. The Roman Cathedral in the City of Providence, Saints Peter and Paul, I believe the name is.

Q.77. And that meeting was attended by Father Mullen and [19] other administrators of the Diocesan schools; is that right? A. That is correct.

Q.78. And by principals of Diocesan schools and some of the pastors of those schools? A. That is correct.

Q.79. When did you say that meeting took place? A. I don't recall the date.

Q.80. Was it before school opened? A. It was before the opening of school. It was held at the same time that, according to Father Mullen, that he passes the annual directions for the operation of the schools.

Q.81. In other words, was it a special meeting for your presence? A. It was not a special meeting for my presence.

Q.82. Other administrative matters were taken up by the Diocesan schools at that time? A. I was not present when these matters were taken up, but I would imagine that the meeting was called for several reasons.

Q.83. What was your participation, just a portion of the meeting? [20] A. Yes.

Q.84. And how did you participate, sir? A. I just explained the operation of the act and at that time I also, for clarification purposes, distributed copies of the preliminary forms. They were not at that time final or at least I did not consider them as such.

Q.85. And this was before the regulations had been approved? A. I don't know. I don't remember the exact date. I could check on that for you.

Q.86. You said "forms," you mean the forms that subsequently had not been yet finalized? A. That is correct.

Q.87. About how long did you attend that meeting, sir? A. Fifteen, 20 minutes.

Q. Did you attend any similar meetings for any other groups of non-public school administrators or principals or teachers? A. No, but I did meet with some in my office and I answered and I gave the same information to them over the phone. I know of no other organization—I mean, it was a convenience matter for me to do it in this manner.

Q.89. Other than that meeting, you answered specific inquiries [21] from people; is that right? A. Yes.

Q.90. By telephone or people who came to your office asking for information? A. That is correct.

Q.91. Did you have additional conferences or discussions with administrators or principals or teachers of the Diocesan schools in connection with the administration of the statute? A. No.

Q.92. You, I think, testified a few moments ago that you spoke or conferred with Father Mullen, did you speak with him on any occasions in addition to the meeting at the Cathedral complex? A. I talked with Father Mullen to arrange my presence at this meeting. I know of no time during which I discussed the Salary Supplement Act with Father Mullen. It might very well have been I might have met him in the corridor here or at various times and we may, in passing, make a comment or two about the Salary Supplement Law, but there has been no formally arranged meeting for the purpose of the discussion of the act.

Q.93. Did you have occasion from time to time to seek [22] information regarding the operation of the Diocesan schools in connection with this program, did you give him a call? A. Prior to the enactment of the act, I inquired of Father Mullen to determine the number of lay teachers that were employed by the Diocesan School System.

Q.94. And was that on one occasion you spoke to him prior to the enactment, at least with respect to getting information? A. As well as I can recall, yes.

Q.95. Other than meeting him informally from time to time? A. That is correct.

Q.96. Did you make inquiries of other organizations or other non-public school administrative officers who re-

quested such information? A. Yes, I did. I not only did that, but I compiled prior to the enactment of the act a list of the number of teachers. Of course, being responsible for the Division of Statistical Services, it is part of the responsibility of that division to obtain information on teachers annually. This was prior to the enactment of the act and I really don't quite remember the source of the information, but I compiled something.

[23] Q.97. So that prior to the enactment of the law you had obtained information as to the number of teachers in both the parochial schools as well as in the so-called non-parochial schools? A. Non-Diocesan schools because if you will note on that list there are several independent religious-oriented schools.

Q.98. Those categories that you have just described, are those the two categories of non-public schools in the state?

Mr. Allen: I object. I think he described three categories.

The Witness: There are as many categories of non-public schools as one would care to develop. In the State Department of Education we have a census handbook that we develop and there are the Diocesan schools, the independent schools. In the independent school category are all non-public, non-profit institutions, secondary and elementary. I mean, it makes no difference whether they are religious oriented or not. It is just for purposes of convenience. We take the Diocesan schools, and I guess all other schools—we call all other schools independent schools.

Q.99. Let me ask you this, sir: with respect of the [24] categorization of non-public schools, has it been a practice from time to time of the Department of Education to categorize non-public schools in the state as either parochial schools, on the one hand, or independent schools, sir, on the other hand?

Mr. Allen: Objection. You may answer.

The Witness: I don't know what your meaning of the word "parochial school" is.

Q.100. Prior to the enactment of the law, did the General Assembly request a breakdown from the Department of Education as to the number of elementary school teachers in the parochial schools and the independent schools?

(Whereupon pending question was read by the reporter)

The Witness: As far as I know, the General Assembly never made such a request. It is customary, however, when legislation is introduced that carries an appropriation for the department concerned to develop a fiscal note. We are asked, "How much is this going to cost us?" We were asked this question on this particular proposed legislation. In [25] order to develop a cost figure it was necessary for me to know approximately the number of non-public school teachers who might be eligible under the proposed statute.

Q.101. Was such a fiscal note prepared by the department in connection with this considered program? A. It was.

Q.102. And do you have a record of that fiscal note? A. I do.

Mr. Shine: May I see it, sir?

Q.103. You have handed me, sir, what appears to be a form, "State of Rhode Island and Providence Plantations, General Assembly, Fiscal Note Request Number 58, Bill Number H-765," and at the bottom it says, "Prepared by Department of Education," and it is dated April 9, 1969; is that the fiscal note request that you referred to and which you had prepared? A. That is the request that I am referring to.

Mr. Shine: I would like that marked as Plaintiffs' Exhibit, please.

Mr. Allen: Well, I will object on the ground that there is no testimony at this point that this is, in fact, the way the program was finally [26] adopted and at this time I suggest that it be marked for identification until we may agree later that it may become a full exhibit.

Mr. Shine: At this time I would ask that it be marked as a deposition exhibit.

(Whereupon Fiscal Note Request was marked as Plaintiffs' Exhibit No. 4)

Q.104. Now, the bill that is referred to in that Fiscal Note Request is H-1765, do you have a copy of that bill, sir? A. I do.

Mr. Shine: May I see it, sir?

Q.105. And this was the bill that was introduced but was not enacted, but was amended and was subsequently passed as H-1765, Substitute A?

Mr. Allen: Objection.

The Witness: I don't know.

Mr. Shine: I would ask that this be marked as an exhibit.

Mr. Allen: I object as to relevance

(Whereupon Bill Number H-1765 was marked as Plaintiffs' Exhibit No. 5)

Q.106. Now, Mr. Wilcox, are you familiar with the provisions [27] of H-1765 as it was originally introduced?

Mr. Allen: Objection.

The Witness: I am not at this time.

Q.107. Did you ever read it, sir? A. I am sure that I must have if I prepared a fiscal note on it.

Q.108. Now, I direct your attention to the definition section of that proposed bill on Page 3 and at the same time refer you to the "Definitions" section under the bill as it was enacted as H-1765 A, which is here as Plaintiffs' Exhibit 2, and I refer you specifically to the definition of non-public school in those two places. Would you examine those, sir? A. Yes.

Q.109. Now, in the bill as originally submitted, is there any exclusion for non-public schools relative to annual per pupil expenditures?

Mr. Allen: Objection.

Mr. Shine: Is there.

Mr. Allen: You may answer.

The Witness: I see none.

Q.110. But there is in the bill as it was finally passed; is that right?

[28] Mr. Allen: Objection. You may answer.

The Witness: There appears to be.

Q.111. Now, directing your attention to Plaintiffs' Exhibit 4, under the definition of non-public schools, would that definition include both parochial schools and independent schools as described in Exhibit No. 4?

Mr. Allen: May I have the question read back, please?

(Whereupon pending question was read by the reporter)

Mr. Allen: Excuse me a moment. I object. You may answer.

The Witness: Exhibit 4, the fiscal note, develops a cost figure that includes parochial schools and independent schools. It was developed for Bill Number H-1765.

Mr. Allen: I confirm my objection by a motion to strike at this point.

Q.112. So that the information that is provided in Exhibit 4 is provided with the understanding on your part that the bill would cover both the so-called parochial schools and independent schools; is that correct?

[29] Mr. Allen: Objection.

The Witness: I prepared the fiscal note using the definition that appeared in the proposed legislative act, H-1765.

Q.113. So that, therefore, when you prepared this information you believed that both parochial schools and the independent schools, as described in Exhibit 4, would come under the definition of "non-public schools" under H-1765; is that correct?

Mr. Allen: Objection. You may answer.

The Witness: Exhibit 4 develops a cost figure for both parochial schools and independent schools.

Q.114. Is there any question in your mind that the definition in H-1765 was to cover parochial schools when you prepared that fiscal note?

Mr. Allen: Objection.

The Witness: The fiscal note was prepared only in that manner—only as a convenience.

Q.115. Let me ask you this, Mr. Wilcox: under the definitions of non-public schools, as it was ultimately passed by the General Assembly, with the exclusion relating to annual pupil expenditures, are there any independent [30] schools in the State of Rhode Island that qualify for that aid that you know of? A. There may very well be. I would not know. The participation in the law is entirely voluntary.

Q.116. Have there been any applications by independent schools that have provided you with information upon which you have concluded that any independent schools qualify for this aid?

Mr. Collins: I would like to object. As I understand it, you do not make applications by the school but it is teacher applications.

Q.117. Well, these forms you have provided for the non-public schools come back from non-public schools, don't they? A. The application forms come back from the teachers. It is necessary to obtain Form 31 NPS from the schools which is the summary of expenditures.

Mr. Shine: That is what I am referring to.

Q.118. The material that comes back from the schools, was there any material that came back from independent schools that allowed you to determine that any independent school was eligible for this aid? A. I received a summary of expenditures, Form 31 NPS, from [31] two so-called independent schools, neither of which qualified under the statute.

Q.119. Which schools were those, sir? A. The Governor Center School and the Providence Hebrew Day School.

Q.120. Why did those two schools not qualify? A. Because their average per pupil expenditure, it appeared that their annual per pupil expenditure exceeded the annual per pupil expenditure for the public schools in the second

preceding year. May I also state that examination of the expenditure data is not made until such time as applications are received from teachers in those schools and no request, no teacher applications were received from the Providence Hebrew Day School. Teacher applications were received from the Governor Center School.

Q.121. Is it your testimony that neither of these independent schools qualified because of their coming within the exclusion under the definition relating to annual pupil expenditures? A. I do not consider that there is any exclusion in the act.

Q.122. Isn't there an exclusion from the definition of non-public [32] schools under 16-51-2?

Mr. Allen: Objection. You may answer.

Mr. Shine: Where it says, "Except such schools," et cetera, doesn't that—

The Witness: If this is what you consider to be an exclusion, yes.

Q.123. Well, doesn't that language mean that certain calculations are made and if the calculations come within the language of that phrase that those schools do not qualify as non-public schools for aid? A. I believe, Mr. Shine, that you are making an assumption. Schools do not qualify, teachers qualify.

Q.124. My question is: doesn't that "except clause," starting from the word "except," doesn't that mean that certain calculations as to per pupil expenditures are to be made and if those calculations bring the school in line with the language of the "except clause" that those schools do not come within the definition of non-public schools and, therefore, their teachers are not eligible for the salary aid; is that correct? A. I would assume that that is a correct statement, yes, sir.

[33] Q.125. Now, the two independent schools you refer to do not come or did not and do not come within the definition of non-public schools; is that correct? A. The Governor Center School did not. Since no teacher appli-

cations were received from the Providence Hebrew Day School, no definitive determination was made in the case of their expenditures.

Q.126. Did they provide the expenditure information to you? A. They did.

Q.127. Did you make any calculations on the basis of that information? A. I did. It appeared that they would not—their teachers would not qualify. If there had been any applications, I certainly would have recalculated as carefully as possible in order to determine their teacher eligibility.

Q.128. Now, directing your attention to Exhibit 5, which is the initial form of the Salary Supplement Bill as it was introduced, would either of those schools, the independent schools you have referred to, come within the definition of non-public schools if that bill had been enacted?

Mr. Allen: Objection. You may answer.

The Witness: May I say an aside, please?

[34] Mr. Allen: You have my objection.

The Witness: Yes.

Q.129. And, therefore, presumably the teachers in those schools would have qualified for this aid if the original bill had been passed; is that right?

Mr. Allen: I object.

The Witness: Yes.

Q.130. Now. do you know the annual per student expenditure in the public schools for schools in the State of Rhode Island? A. I do.

Q.131. Is that one figure per grade or do you have an average figure, how is that calculated by the department? A. That is calculated on the basis of expenditures per pupil in Grades one through eight.

132. Q. How long has the department been making those calculations? A. I guess long before I was born.

Q.133. Many years? A. Many years.

Q.134. Does your department have information as to the annual per pupil expenditure of non-public schools in the

State of Rhode Island? A. We do not, except that that was furnished under this [35] particular statute.

Q.135. Are you in your capacity generally familiar with the operations of the non-public schools in this state? A. I believe I am, not necessarily in my capacity as an Associate Commissioner for Research and Planning, but for many years I was Associate Commissioner in charge of Instruction and as such dealt with the operation not only of public schools but participated in many activities in which the non-public schools also were participating.

Q.136. Do you personally know if there are any independent schools in the State of Rhode Island who come within the definition of non-public schools as enacted in the law so as to make the teachers eligible for this aid? A. There may very well be several that have not applied.

Mr. Shine: I am asking if you know of any?

The Witness: I would not want to make a statement that this or that school is or might likely have a per pupil expenditure less than the public schools, but my familiarity with the operation of independent schools leads me to believe that, perhaps, there may be some.

[36] Q.137. Is it fair to say that probably most of the independent schools do not come within the definition under the statute as it was enacted? A. That is possibly a fair statement.

Q.138. Is it a fair statement? A. Rhode Island independent schools—most Rhode Island independent schools probably would not meet the qualifications stated in the act.

Q.139. Of your own personal knowledge, do you know of any who you think would meet the qualifications? A. There are several that I think might.

Q.140. But they didn't apply? A. They did not apply.

Q.141. Do you have any reason to know why they did not apply for this aid in the event that they might have been qualified?

Mr. Allen: I object on the ground that it calls for speculation. You may answer.

The Witness: No more so than many parochial schools or so-called Diocesan schools did not apply. They, perhaps, believed they would prefer not to have the support.

Q.142. Was that, in fact, the case with respect to some of the [37] schools, that some of them did not want to apply because they did not want the support?

Mr. Allen: May I have that question?

(Whereupon pending question was read by the reporter)

Mr. Allen: I object. There is no showing that he has any knowledge and so his answer would be entirely speculative.

Mr. Shine: That is the reason for my question, to find out if he does know.

Mr. Allen: You may answer.

The Witness: I have some forms returned from one school with a note at the top stating, "The pastor has not accepted this plan."

Mr. Shine: May I see that, sir?

Q.143. What school was that from, sir? A. Saint Mark's School, 43 Poplar Drive in Cranston. I have correspondence from one or two other schools in which they state that they are not participating in the plan for various reasons.

Q.144. Are any of these independent schools? A. I don't believe so.

Q.145. Do you, sir, have a list of all of the teachers who did [38] apply and who have applied for this aid? A. I do.

Q.146. And do you also have a list of those teachers who have been determined by you to be eligible under the statute? A. I do.

Mr. Shine: I would like to take a look at those, please.

The Witness: That is a copy of the list of applicants.

Q.147. Do you have the other list, sir? A. What is the other list?

Mr. Shine: Of those who have been determined eligible, or is that on the same list?

The Witness: If you took the ones off there—if you want the other list that I had prepared—

Mr. Shine: Yes, if you please.

The Witness: Since this is a progressive matter the two may not check out completely.

Q.148. You have handed me two lists, sir, one entitled, "List of Payees, Chapter 246 of Public Laws of 1969," is that the list of teachers whom you have determined qualified under this law, sir? [39] A. Is there a date on that? At that time, yes.

Q.149. As of approximately what date is that, sir? A. February 16th.

Q.150. And the first list which you have handed me is entitled, "Non-Public School Teachers Salary Supplements," containing simply names and addresses, and that is a list of those teachers who applied? A. That is correct.

Q.151. And only some of whom were determined subsequently to be eligible; is that correct? A. That is correct.

Mr. Shine: I would ask that the latter list be marked as a Plaintiffs' Exhibit.

Mr. Allen: Note my objection on the ground of relevance.

(Whereupon stapled document entitled "Non-Public School Teachers Salary Supplements" was marked as Plaintiffs' Exhibit No. 6)

Mr. Shine: I ask that the list entitled "List of Payees" be marked as a Plaintiffs' Exhibit.

Mr. Allen: Objection.

(Whereupon document entitled "Chapter [40] 246 of Public Laws of 1969" was marked as Plaintiffs' Exhibit No. 7)

Q.152. Mr. Wilcox, referring you to Plaintiffs' Exhibit 7, the list of payees whom you determined eligible for this aid, are there any teachers in independent schools, so-called, who are shown on this list as qualified for this aid? A. I believe not.

Q.153. In fact, are all of the teachers who are listed on this document as being eligible for this aid not teachers in various Roman Catholic Parochial Schools? A. I would have to check that out. I would not want to make a categorical statement that that is so.

Q.154. Are substantially all of them? A. Substantially all of them, I would assume, are.

Q.155. Are there any that you know of that are not teachers in the Catholic Parochial Schools? A. I don't know.

Q.156. How long would it take you to find out with certainty as to whether there were any that were not teachers in the Catholic Parochial Schools? A. I would have to go back through my records and check against each school code there to determine whether or [41] not the school in which the teacher is employed is a Diocesan school or a Roman Catholic School and that, again, would be my judgment also.

Q.157. Do you have any reason to believe that any of these teachers are not teachers in the various Catholic Parochial Schools?

Mr. Collins: Objection. You have asked him that and he has answered it. The question has been asked and answered.

Q.158. Are there any schools that you have determined qualify to have their teachers paid this aid which are not Catholic Parochial Schools? A. Again, I would have to go back through my records and determine this.

Q.159. How long would that take you, sir? A. Oh, if I were to do it now it might take me a half to three-quarters of an hour.

Mr. Shine: I would request that you do that, sir, so we could have that information and an answer to those two questions.

The Witness: I would need that material.

Mr. Shine: Yes, I have no objection to [42] letting you have the material.

Q.160. Do you have forms which have been filed by a John R. Earley?

Mr. Allen: I object. I don't see what relevance that has.

Q.161. Do you have the forms? A. May I look? If his name appears on one of those lists, why I would assume that I have the forms. His certificate number is 34160. I have on this list of payees a John Richard Earley of 5 Cumberland Road, Riverside.

Mr. Shine: May I inquire of counsel for the intervenors if that is the Mr. Earley who is one of the intervenors?

(Off the record colloquy)

Q.162. Do you have the financial information supplied by Mr. Earley's school in conjunction with his application, sir?

Mr. Shine: I would ask that this form, Form 41 NPS, for non-public school teacher salary supplement for John R. Earley be marked as a Plaintiffs' Exhibit.

Mr. Allen: I ask that it not be [43] marked and that a copy be marked in its stead.

Mr. Shine: No objection.

(Whereupon Form 41 NPS relative to John Richard Earley was marked as Plaintiffs' Exhibit No. 8)

Q.163. You have just handed me a non-public school report of expenditures and membership for Saint Francis Xavier School, 160 Orchard Street, East Providence, Rhode Island, signed by Manuel Rego, Pastor, I believe; is that the financial information for the school that Mr. Earley teaches at? A. Yes.

Mr. Shine: I ask that that or a copy of it be marked as an exhibit.

(Whereupon Form 31 NPS relative to Saint Francis Xavier School was marked as Plaintiffs' Exhibit No. 9)

Q.164. Let me ask you, Mr. Wilcox, has the department made inquiry in any manner as to whether or not any

of the schools whose teachers have been determined eligible for this aid, whether those schools have complied with the provisions of Title 6 of the Civil Rights Act of 1964?

[44] Mr. Allen: I object.

The Witness: May I answer?

Mr. Shine: Please.

(Off the record colloquy)

Mr. Allen: All right, on the record. There are many, many aspects of the Civil Rights Act of 1964. I do not know, in the first instance, that Mr. Wilcox is a lawyer so that I do not know that he is familiar with it. I do not know that he is familiar with the interpretation of it. I don't know. I do not see the thrust of the question and I think it is a buckshot question which patently Mr. Wilcox is incapable of answering intelligently. I do not see what the relevance is even as a matter of discovery.

Mr. Shine: I will withdraw the question and refer you, Mr. Wilcox, to your regulations.

Q.165. Directing your attention, then, Mr. Wilcox, to the regulations under this law, specifically "Procedures," Roman numeral II (B) (4), are you familiar with that provision sir? A. I am.

Q.166. Doesn't that require each non-public school teacher to submit to the Commissioner of Education upon forms [45] prescribed by him a statement signed by the principal that the school complies with the provisions contained in Title 6 of the Civil Rights Act of 1964?

(Whereupon pending question was read by the reporter)

Mr. Allen: I object. First of all, I object because you mis-stated the regulations. Secondly, I find no relevance between this question and the Bill of Complaint.

(Off the record colloquy)

Q.167. Are you familiar with Regulation II (B) (4), sir? A. I am.

Q.168. Does the department have any forms for that purpose? A. There is on file—

Mr. Allen: I object to this whole line of testimony. I do not want to interrupt the deposition unduly by repeating these objections, but for all of the reasons stated I object to this entire line of questioning. Is that understood, Mr. Shine?

Mr. Shine: You have stated it and I assume it is on the record, Mr. Allen.

Q.169. Are there any such forms, sir? A. There is on file at the Department of Education a [46] statement saying that each of the schools complies with the Civil Rights Act of 1964, Title 6.

Q.170. Is that for all schools or is that for all non-public schools? A. If I had received an application from teachers in a school in which I believed there might not be such a form on file, I would check with the Equal Educational Opportunities Division of the Department of Education to ascertain that such a statement was on file. I do not maintain such a file myself.

Q.171. When the materials came in under the regulations and your procedures under this statute, as a matter of routine or as a matter of ministerial work, sir, was there a check made for each school to determine whether such compliance has been carried out? A. There was.

Q.172. And is it your testimony that, in fact, there was compliance by all such schools? A. There is a statement on file of such compliance.

Q.173. Was there correspondence sent by your department to the non-public schools subsequent to September 15, 1969? A. Not by me that I can recall.

Q.174. Was there anything sent out in January of 1970? [47] A. A communication was sent on January 9, 1970, addressed to the principals of non-public schools, from me. This was a communication which we requested the non-public schools to submit to this office or to my office

under Regulation B-2 a list of teachers who have applied for a salary supplement.

Q.175. And that letter was dated January 9? A. January 9, 1970. That was sent out to all principals, all non-public schools.

Q.176. Were there enclosures with it, sir? A. Yes.

Q.177. Do you happen to have any copies of enclosures? A. It is a copy of the form that you—

Mr. Shine: That is called Exhibit 3?

The Witness: One of the forms.

Q.178. Is that the request for current expenditures? A. No, it is Form Number—

Q.179. Thirty-two NPS? A. Thirty-two NPS.

Q.180. I would ask that the January 9th letter be introduced.

(Whereupon letter dated January 9, 1970, from Mr. Wilcox to principals of non-public schools, was marked as Plaintiffs' Exhibit No. 10)

[48] Mr. Shine: Mr. Wilcox, I have no further questions at this time, but in accordance with the previous request I made to determine whether there were any non-Catholic Parochial Schools or teachers in such schools who have been declared eligible by you, sir, when we have concluded here would you be kind enough to determine that and we would like to get it on the record.

The Witness: All right. It will take me, as I said before, a half to three-quarters of an hour to do it.

Mr. Shine: That is all I have at this time.

Mr. Collins: We have no questions.

Mr. Allen: I have no questions at this time.

(Whereupon the deponent concluded his testimony in the morning session and returned at approximately 2:30 p.m. in the afternoon session)

Edward F. Wilcox, Resumed

Examination By Mr. Shine

Q.181. Mr. Wilcox, have you now had an opportunity to examine your files to determine whether or not there

are any [49] teachers who have been approved by the Department of Education for the salary supplements who are not teachers in the Catholic Parochial Schools? A. There are none.

Q.182. And do you have the number of teachers who have been approved? A. One hundred sixty-one.

Q.183. In the list of payees that is an exhibit here, there are annexed to each approved teacher's name a code number, referring, I believe, to that teacher's school; is that correct? A. That was an administrative convenience. It was not required, but we thought we might be asked at sometime in the future, since this is a public record, about a particular teacher's status. For that reason we identified it by a school code number.

Q.184. And do you have a book or manual which provides the information as to what schools are represented by those code numbers? A. We used our Census Enumerators' Handbook, 1969, published by the Rhode Island State Department of Education, Division of Research and Planning.

Q.185. Is that the handbook that you have just handed to me? [50] A. It is.

Mr. Shine: I would ask that this be marked as an exhibit.

(Whereupon Census Enumerators' Handbook, 1969, was marked as Plaintiffs' Exhibit No. 11)

Mr. Allen: Well, at this time I would pro forma object to it being marked as a full exhibit inasmuch as I have not had the time or I am not familiar with the book and I would like to have an opportunity to determine with precision what is in it and what is involved and whether there is any material in it which is irrelevant and prejudicial. Therefore, I would object at this time until I have had an opportunity to study it. Maybe by then I will be perfectly willing to have it marked as a full exhibit.

Mr. Shine: All right. I have nothing further.

Mr. Collins: I have nothing at this time.

Mr. Allen: Nothing.

Plaintiffs' Exhibit No. 2

[Deposition of Appellant John R. Earley]

* * *

[1] JOHN R. EARLEY, first having been duly sworn, testified as follows:

Examination by Mr. Shine

Q.1. What is your full name, sir? A. John R. Earley.

Q.2. Where do you live, sir? A. 5 Cumberland Road, Riverside, Rhode Island.

Q.3. And what is your occupation? A. Educator.

Q.4. Where are you presently engaged? A. Saint Francis Xavier School, East Providence.

Q.5. Is that a Roman Catholic parochial elementary school? A. Yes.

Q.6. In what capacity are you engaged? A. Principal and teacher.

Q.7. What do you teach? A. Science, mathematics, social studies.

Q.8. How long have you been at that school, sir? A. This is my first year, sir.

Q.9. Have you taught previously? A. Yes, sir.

Q.10. Where have you taught? A. Saint Cecilia's School in Pawtucket; Saint Mary's [2] Academy, Bay View, East Providence; Holy Name School in Providence, and for the State of Rhode Island at the Rhode Island Boys Training School.

Q.11. Other than the training school position, it was Roman Catholic parochial schools; is that correct? A. Yes, sir.

Q.12. Now, are you one of the intervenors, so-called, who have entered this suit? A. Yes, sir.

Q.13. Are you familiar with the Salary Supplement Aid Bill? A. Yes, sir.

Q.14. You have applied for Supplemental Aid under that bill; is that correct? A. Yes, sir.

Q.15. And your application has been approved as far as you know? A. Yes, sir.

Mr. Collins: I might say from his standpoint he assumes that, but we know from this morning that it was. That might at least be nice news for him.

Q.16. Now, what was the first contact that you had with the Department of Education after the Salary Supplement [3] Bill was passed? A. It would have been the letter I had from Mr. Wilcox after the bill was passed. I think there was—after the bill was passed, I believe there was a meeting here in this building downstairs, although I am not clear whether that was before or after, although I think it was after. If not, it would have been the letter from Mr. Wilcox asking for the teachers in the school who were applicable for the subsidy.

Q.17. You refer to a meeting. What sort of a meeting was that, sir? A. There was a hearing here downstairs as to how, I believe, the bill was going to work. I think this was after passing. It was downstairs on the lower floor.

Q.18. Was that a meeting that the commissioner had? A. Yes, sir.

Q.19. Was it a public meeting? A. Yes, sir.

Q.20. What was discussed there, do you remember? A. I believe it was just as to how the bill—how it was to be paid, how it was to be worked out.

Q.21. And who spoke at that meeting? [4] A. Father Mullen, I believe, was questioned. There were some members in opposition to it who spoke, and Dr. Robinson and I believe Mr. Wilcox was there, too.

Q.22. Do you remember approximately how many people in all were at that meeting? A. Oh, maybe about 20, 25.

Q.23. Subsequent to that you received communication, did you say, I think, from— A. After the bill was passed. The only communication would have been the letter from Mr. Wilcox asking for the teachers who were applicable for the salary subsidy from any school.

Q.24. He sent you some forms? A. Right.

Q.25. What did you do with those materials, sir? A. Filled them out as requested and returned them to him.

Q.26. You filled out forms asking for financial information, for example, do you recall that? A. No, it had asked for the teacher's name, their social security number, their certification number, their address, and if they complied. I believe, well, actually, that was what it was—teachers who did comply with all the rules and regulations.

[5] Q.27. Did you circulate these for teachers to sign, these applications? A. No. The form that I received, if I remember correctly, simply wanted their name, address, social security number.

Q.28. Do you recall getting actual applications for different teachers to fill out? A. Yes.

Q.29. Did you distribute those to the teachers? A. They had to sign them, yes.

Q.30. And what did they do with them, give them back to you? A. They sent them right in.

Q.31. To you? A. Yes. We all sent them back together.

Q.32. You submitted the material for the teachers at the same time you submitted the information that was requested from the school; is that right? A. Yes, sir, I believe so.

Q.33. Who employs you specifically? A. Saint Francis Xavier Parish.

Q.34. Who actually engages you, for example, who did you interview with, for example? A. Well, at the time I interviewed with a Dr. Pat Faunce, [6] who was a professor of education at the University of Rhode Island, and was interviewing the prospective teachers and principal for the pastor.

Q.35. Is that gentleman a member of that parish? A. It is a woman.

Q.36. A woman? A. Not presently because she was teaching at U.R.I. She had been previously.

Q.37. And you say she was interviewing for the position for the pastor; is that correct? A. That's correct.

Q.38. And did she actually hire you or did she just make a recommendation? A. The pastor did.

Q.39. Subsequently the pastor engaged you; is that right? A. Yes, sir.

Q.40. Are you employed under a written contract or is it just an oral arrangement? A. It is a written contract.

Q.41. And for a term of years? A. For one year.

Q.42. You don't have a copy of your contract with you. do you? [7] A. No, sir.

Q.43. Do you have a copy of the contract? A. Yes, sir.

Q.44. And under that contract who is the employer? A. Well, it is signed by the pastor.

Q.45. So the church, through the pastor, actually employs you; is that your understanding of it? A. Yes, sir.

Q.46. How are faculty members, other than the principal, engaged in your school? A. They were engaged in much the same way as I was.

Q.47. This lady interviewed them, then made recommendations to the pastor; is that correct? A. Yes, sir.

Q.48. And do your other teachers at the school, other than yourself, also have written contracts as far as you know? A. Yes, sir.

Q.49. Are they one-year arrangements? A. I would say so, yes, sir.

Q.50. And all with the same employer as you have? A. I would say so.

Q.51. Who is the pastor at your school or who was at that time? [8] A. Reverend Manuel Rego.

Q.52. Do you have full responsibility and authority to run the school? A. Yes, sir.

Q.53. Do you make decisions as to curriculum and programming for the school? A. Yes. sir.

Q.54. Do you have any guidelines or regulations within which you must work and operate the school? A. Well, we have the guidelines insofar as the state regulations are concerned, yes, sir.

Q.55. And how about the Diocese, does the Diocese provide you with guidelines? A. The Diocese puts out a handbook of regulations which are a general guideline, yes.

Q.56. How about the parish, does the parish have any regulations of any sort? A. No, sir.

Q.57. Do you communicate from time to time with your pastor or other representatives of the church with regard to the operation of the school? A. No, sir.

Q.58. Is there a Board of Trustees or Board of Directors for [9] the church, if you know? A. I don't know. I believe there would be trustees for the church, but there is no relationship between them and the school so I really don't know.

Q.59. Do you have occasion to communicate from time to time with any representatives of the parish regarding operations of the school? A. Only insofar as a parish school board of parents of the children, but they are not representatives of the parish. They are representatives of the children.

Q.60. These are parents who generally are members of the parish who have students who go to the school? A. Yes. sir.

Q.61. Does the school that you are principal of have a name? A. Saint Francis Xavier School, yes, sir.

Q.62. The same as the church? A. Yes, sir.

Q.63. Is it in the same vicinity as the church itself? A. Yes.

Q.64. Is it on the church grounds? A. It is right next door to the church, yes, sir.

Q.65. And is the church connected to the school building in any way? [10] A. Physically?

Mr. Shine: Yes.

The Witness: No, sir.

Q.66. Does the name of the school appear on the outside of the building? A. Yes, sir.

Q.67. Is there any designation or crucifix on the outside of the building to indicate that it is connected with the church? A. There is no crucifix, no, sir.

Q.68. Just the name on the outside? A. There is a cross.

Q.69. And inside the school building are there in various parts of the building manifestations of the fact that it is a Catholic parochial school? A. Yes.

Q.70. What nature, sir? A. Crucifixes.

Q.71. Where would these be in the school? A. There would be one in each room.

Q.72. Are there other manifestations? A. Statues.

Q.73. Throughout the building and in the rooms? [11] A. Yes, sir.

Q.74. Anything else? A. No, sir.

Q.75. You say "statues," you mean religious statues? A. Yes, sir.

Q.76. Of Catholic saints? A. Yes.

Q.77. Is there anything else you can think of, any pictures or regilious figures? A. Well, in the lobby we have a picture of the Pope and one of the Bishop.

Q.78. Anything else you can think of? A. Of religious connotation, no.

Q.79. What grades does your school run through? A. Kindergarten through six.

Q.80. And are there any students in your school whose families are not members of the parish? A. Yes, sir.

Q.81. How many? A. I would say, offhand. at least four because they come from a distance so they would not be members of the parish.

Q.82. Are they Catholic? [12] A. Yes, sir.

Q.83. How many students in the whole school? A. We have 270.

Q.84. With the exception of those four, the other students—their families are members of the parish? A. I wouldn't say so, not necessarily, because we do have many children that come from the East Providence Region whose parents may be members of other parishes.

Q.85. Would you say most of the students are parish people? A. Yes, sir, I would, sir.

Q.86. Now, on your faculty do you have nuns teaching in the school? A. No, sir.

Q.87. How many teachers are there in the school? A. Well, including myself it would make eight.

Q.88. Are they all lay people? A. Yes. sir.

Q.89. Is there a formal religious course taught in the school? A. Yes, sir.

Q.90. Who teaches that? A. Well, I have two people on the faculty that handle the religious programs.

Q.91. Who would those be? [13] A. Their names?

Mr. Shine: Yes.

The Witness: One is Miss Marie Mello and the other is Miss Mary Aguiar.

Q.92. Have they applied for salary supplements, do you know? A. No, sir.

Q.93. Now, when is the religion course taught in the school? A. Well, there is no set time. Each class has its own particular time. There isn't religion going on in every class at one time. It goes with the teacher.

Q.94. You say these are the only teachers that teach religion. Do they move from class to class? A. Yes, sir.

Q.95. They rotate the time during the day when religion is taught? A. Yes, sir.

Q.96. How much is taught to students in terms of formal religion courses? A. Well, we teach religion three days a week for 30-minute periods. That would be an hour and one-half a week.

Q.97. Now, who determines where the classes will be taught, do you decide that? A. Where they will be taught? Yes, I do.

[14] Q.98. From what you have said before, the religion course is taught in each room with the teachers moving around? A. Yes, sir.

Q.99. How about other subjects such as math, are they taught by a teacher who moves or by a teacher who stays? A. A teacher who moves.

Q.100. And the children stay in the same room; is that correct? A. That is correct.

Q.101. And math is taught in that fashion? A. Yes, sir.

Q.102. And science is taught in that fashion? A. Yes, sir.

Q.103. Are there any foreign languages that are taught? A. Yes, sir.

Q.104. What languages? A. Portuguese.

Q.105. Is that taught in that fashion also? A. Yes, sir.

Q.106. So there is no special room that any of these courses are taught in; is that right? A. No, sir.

Q.107. Now, who controls the finances of the school of which you are principal, sir? [15] A. The pastor.

Q.108. Is it determined through him how much is available to be spent for the school during the year? A. Well, very generally speaking, I would have to say yes, although if I need books or materials I don't have to ask him for these.

Q.109. You have funds, some general funds, that you would have some flexibility to order yourself; is that it? A. No.

Q.110. Where do you get the funds? A. Well, I just turn over any bills to him.

Q.111. What sort of expenditures does the parish carry in terms of the operations of the school, what are the categories, do they pay salaries; is that correct? A. Salaries.

Q.112. What other expenditures? A. The mortgage on the building, heat, light, oil. maintenance, supplies.

Q.113. Is it fair to say the parish pays all the expenses of operating the school? A. Oh, yes.

Q.114. Now, how many teachers in your school have applied for Supplement Aid, do you know, sir? [16] A. Yes, there would be five.

Q.115. Now, all of these teachers have previously executed employment contracts with respect to the current year; is that correct? A. Yes, sir.

Q.116. And is there provision made for a set salary for those teachers? A. Yes, sir.

Q.117. And how, administratively, is the matter of the expected supplemental payments handled or expected to be handled? A. How does the supplement come into the—

Mr. Shine: Yes.

The Witness: Well, we have contracted for a gross salary, 15 per cent of which is expected to come from the State Salary Supplement whenever the State pays the supplement.

Q.118. How do you pay the teachers, on a weekly basis or monthly basis? A. No, they are paid every two weeks.

Q.119. Now, your salary, for example, what is your salary? A. My salary is $8,000.

Q.120. Now, your contract is for that amount; is that correct? [17] A. That's correct.

Q.121. And you get salary payments every two weeks, correct? A. Yes, sir.

Q.122. And those payments every two weeks, are those based on a salary of $8,000? A. Minus the 15 per cent.

Q.123. So that the parish has committed itself to pay the $8,000 to you? A. Yes, sir.

Q.124. Although you do not necessarily expect it all to come from the parish; is that right? A. No, sir.

Q125. Now, you are paid year round or just during the school year? A. I am paid year round.

Q.126. So 12 months, you have payments every two weeks? A. Yes, sir.

Q.127. And if the salary supplement payments were to come in, what would be your procedure for handling that? A. Well, I believe the State would send me directly the check.

Q.128. Now, in connection with the material that was supplied to the Department of Education, are you aware that [18] certain financial information as to expenditures was required to have been submitted? A. Yes, sir.

Q.129. Did you prepare that information or was that prepared elsewhere A. That was prepared elsewhere.

Q.130. Who prepared that for your school? A. Probably the secretary to the parish.

Q.131. Now, do you keep books and records relative to the school's operation? A. On finances?

Mr. Shine: Yes.

The Witness: No, sir.

Q.132. Do you have any means to know the annual per pupil expenditure that your school lays out for secular education of its students? A. No, sir.

Q.133. Do you know if that is possible to be determined by the information that the parish has? A. I am quite sure it would be.

Q.134. Do you know if it has been determined? A. I would presume so, yes, sir.

Q.135. Why do you say that, sir? [19] A. Well, I believe that is one of the pre-requisites of the Salary Subsidy Bill.

Q.136. You have never seen that information provided? A. It was not given to me, no, sir.

Q.137. Now, Mr. Earley, were you active in the community in the State in connection with the legislative session last spring when this Salary Supplement Bill was passed? A. Yes, sir.

Q.138. In any formal capacity or just as a citizen? A. In a formal capacity.

Q.139. What capacity was that, sir? A. As President of the Association of Catholic Educators.

Q.140. How long have you been in that organization, sir? A. Well, it would be four years next October.

Q.141. Did you say you were President last spring? A. Yes, sir.

Q.142. Are you presently President? A. Yes, sir.

Q.143. How long have you had that position, sir? A. Since it was founded.

Q.144. How many people in that organization, approximately? A. Dues paying?

Mr. Shine: All right, dues paying.

[20] The Witness: I would guess around 200.

Q.145. Now, what are the requirements for membership in this organization, sir? A. Simply to be a teacher in the Parochial School System.

Q.146. Catholic Parochial School? A. Yes, sir.

Q.147. You say there are about 200 dues paying members? A. About that.

Q.148. Are there other members who are not dues paying members? A. Yes. Again, generally speaking, any teacher—the work we do benefits any teacher in the system and they are free to take part in any of our programs.

Q.149. Did you last spring while this bill was pending take a position publicly for your organization in connection with this bill? A. Yes, sir.

Q.150. What was that position? A. That it should be passed.

Q.151. Why did you feel it should be passed? A. Because I feel that our teachers, the teachers of secular subjects. are doing the same service to the State of Rhode Island and its citizens as are the public school teachers.

[21] Q.152. Were the Catholic Parochial Schools having financial difficulties meeting the salaries of lay teachers as of last spring? A. They are having financial difficulties which entails that, yes, sir.

Q.153. And would payment of these salary supplements alleviate that problem? A. No, sir.

Q.154. It would not? A. It would help. It would not alleviate it.

Q.155. It would help? A. It would help.

Q.156. In what way would it help? A. Simply that those schools that could not raise the money to hire secular teachers and to keep secular teachers, these teachers would be able to stay if they received an adequate salary.

Q.157. Now, did you ever give statements to the press in connection with your position for this organization last spring? A. Yes, sir.

Q.158. You reiterated that position, you felt this bill should be passed? [22] A. Yes, sir.

Q.159. And did you make this position known directly to members of the General Assembly? A. In a body?

Mr. Shine: No, members.

The Witness: Yes, sir.

Q.160. Who, for example? A. Bob McKenna.

Q.161. Who is Bob McKenna? A. He is a representative from Newport.

Q.162. What is his profession aside from being a legislator? A. He is a teacher.

Q.163. Where does he teach? A. I believe he is at Salve Regina in Newport.

Q.164. That is the Catholic college in Newport? A. Yes, it is.

Q.165. Has he been active in the organization of which you are President? A. No, sir.

Q.166. Has he been active in other similar organizations, other organizations supporting—which supported a financial assistance to or for the parochial schools? A. I believe so.

[23] Q.167. What organization? A. C.E.F.

Q.168. What is that group? A. Citizens for Educational Freedom.

Q.169. He was an officer of that organization, wasn't he, during the last two years? A. That I don't know.

Q.170. Now, what occasions did you speak with Mr. McKenna about this bill? A. Oh, on several occasions. C.E.F. indicated they would support us in our efforts.

Q.171. Do you know that Mr. McKenna introduced this bill, the Salary Supplement Bill? A. No, I do not believe he did.

Q.172. Who introduced it, do you know? A. I believe Mr. Skiffington introduced it.

Q.173. Wasn't Mr. McKenna one of the people who introduced it with Mr. Skiffington? A. Oh, yes.

Q.174. Did you work on behalf of this bill in more ways than speaking to Mr. McKenna on the several occasions you have referred to? A. I urged teachers to support it, yes, sir.

[24] Q.175. What teachers? A. Our teachers.

Q.176. Parochial school? A. Parochial, yes.

Q.177. Did you do anything else, sir, in this regard? A. I testified at the public hearing that they had here in the state house.

Q.178. That was the General Assembly Committee that was considering the bill? A. Yes, sir.

Q.179. Do you know if organizations of teachers other than the Catholic Parochial School Teachers urged the General Assembly to enact this bill? A. No, I do not know that, sir.

Q.180. Do you know if there were any others? A. That supported it?

Mr. Shine: Yes.

The Witness: No, sir.

Q.181. Do you know if there were any organizations or independent non-public schools that urged the General Assembly to pass this bill? A. No, sir.

Q.182. In addition to the religion course that is taught, I [25] believe you said three days a week— A. Yes, sir.

Q.183. Are there formal religious exercises in the school? A. No, sir.

Q.184. Any prayers? A. In the morning, yes, sir.

Q.185. All students participate? A. Yes, sir, they do.

Q.186. Are these Catholic prayers? A. Yes, sir.

Mr. Shine: I have no further questions.

Mr. Collins: No questions.

Mr. Allen: Thank you.

Plaintiffs' Exhibit No. 3

[Regulations of the Commissioner of Education Governing Payment of Salary Supplements to Non-Public School Teachers]

I. Definitions:

A. *Non-Public School*

A non-public school as defined in Section 16-49-2 of the General Laws shall mean any school not operated for profit, other than a public school, within this state wherein a resident of this state may legally fulfill the compulsory school attendance requirements of the law, except such schools whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second proceding fiscal year for school operations as determined by the Commissioner of Education.

B. *Non-Public School Teacher*

A non-public school teacher as defined in Section 16-49-2 of the General Laws is one who teaches in a non-public school exclusively only those subjects required to be taught by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

C. Eligible Teacher

An eligible teacher is one who meets the following qualifications as prescribed by Section 16-49-3 of the General Laws:

(a) Holds an appropriate valid teaching certificate issued by the Department of Education, (b)

teaches in a non-public school as defined in Section 16-49-2 of the General Laws and in these regulations, (c) teaches in any grade from 1-8 exclusively only those subjects required to be taught by state law to the same extent as those subjects are taught in the public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools, (d) receives a salary which meets the minimum salary standards stated in Section 16-7-29 of the General Laws, (e) uses only teaching materials which are used in the public schools of the state, (f) does not teach a course in religion, (g) submits a signed statement in which he or she has promised not to teach a course in religion for so long as he or she receives a salary supplement.

D. *Current Salary*

Current Salary as said term is used in Section 16-49-4 of the General Laws is the amount of remuneration including the salary supplement due a teacher for the term of employment for which the teacher is applying for a salary supplement.

E. *Salary Supplement*

Salary Supplement as said term is used in Section 16-49-4 of the General Laws is fifteen percent (15%) of Current Salary as said term is defined in D. above.

F. *Average Maximum Salary*

Average Maximum Salary is the average of the maximum salaries paid to the public school teachers in Rhode Island as determined by the Commissioner of Education.

II. PROCEDURES

A. *Teachers*

1. An eligible teacher desiring to apply for a salary supplement shall apply annually in the month of September upon forms prescribed by the Commissioner of Education. A teacher beginning employment after the start of the school year shall make application for a salary supplement within 30 days after the beginning date of employment.

2. The salary supplement shall be paid directly to the teacher semi-annually in the months of February and June upon receipt by the Commissioner of Education of evidence that the teacher is eligible to receive such supplement.

3. The salary supplement shall be paid to the teacher only for the term of employment during which the teacher meets the requirements of eligibility.

B. *Non-Public Schools*

1. Each non-public school principal shall submit to the Commissioner of Education annually on or before August 1st of each year, upon forms prescribed by the Commissioner, a certified report of the non-public school receipts and expenditures for the preceding fiscal year July 1-June 30th. Such reports shall be subject to audit by the State Department of Education.

2. Each non-public school principal shall submit on October 1, January 15 and June 15, upon forms prescribed by the Commissioner of Education, a list of teachers in his school who have applied for a salary supplement, and such other information as may be needed by the Commissioner to enable him to carry out his responsibilities under the law.

3. Each non-public school principal shall furnish annually at the close of school in June, to the Commissioner of Education upon forms prescribed by him, the average daily membership of the school for the preceding school year.

4. Each non-public school principal shall submit to the Commissioner of Education upon forms prescribed by him a statement signed by the principal that the school complies with the provisions contained in Title 6 of the Civil Rights Act of 1964.

C. *Department of Education*

1. The Department of Education, upon receipt of an application for a salary supplement, shall determine the applicant's eligibility by verifying whether or not the applicant complies with these regulations and receives a salary in accordance with the provisions of Section 16-49-4 of the General Laws.

2. The Department of Education, upon determination of eligibility of a teacher to receive a salary supplement, shall certify to the state controller on properly authenticated vouchers for payment, a list of eligible teachers and the amount of salary supplement each is entitled to receive.

Note: The August 1st date in B (1) will be waived for the school year 1969-70.

Plaintiffs' Exhibit No. 4

[Letter Sent to Nonpublic School Principals on September 15, 1969]

State of Rhode Island and Providence Plantations
Department of Education
Hayes Street, Providence, R. I. 02908

September 15, 1969

To: Principals of Non-Public Schools

From: William P. Robinson, Jr.,
Commissioner of Education

Regulations have been adopted governing the payment by the State of Rhode Island of Salary Supplements to Non-Public School Teachers under Chapter 16-49 of the General Laws. This statute was enacted by the 1969 General Assembly.

A copy of these regulations is enclosed. They describe who is eligible to receive a salary supplement and the procedures to be followed by the applicant teacher and the principal of each school which employs teachers eligible to receive the salary supplement.

Enclosed also are copies of the teacher application forms and forms for you to complete which will provide the Department of Education with the necessary information about your school and your teachers.

If you believe your teachers are eligible to receive a salary supplement please ask them to complete an application and return it to you. Be certain that each teacher indicates his Rhode Island teacher certificate number. Do not submit any applications without certificate numbers. This first year the due dates for teacher applications and school forms are waived but we would like the information when it is available to begin to process the applications.

Please return all the applications and the school forms in the enclosed envelope. If you have any question regarding the forms or the regulations please contact:

Mr. Edward F. Wilcox
Associate Commissioner of Education
Division of Research & Planning
Roger Williams Building, Hayes Street
Providence, Rhode Island 02908

He may be reached by telephone at 521-7100/Extension 681.

Enclosures (3)

Plaintiffs' Exhibit No. 5

[Fiscal Note on Salary Supplement Act]

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
GENERAL ASSEMBLY

FISCAL NOTE REQUEST

Form GA-1

Forward First Three Copies to Budget Officer

1. White—Fiscal Assistant
2. Pink—Budget Officer
3. Orange—Legislative Committee
4. Green—Fiscal Assistant

Request No: 58
Bill No.: H-765
Date of Request: April 3, 1969
Due Date: April 11, 1969

Subject/Title: Non public school teachers

FISCAL EXPLANATION:

Parochial Schools:—There are 342 elementary lay teachers and 129 secondary lay teachers in the parochial schools.

Assuming the average annual salary for these teachers is $5,000 on the elementary level and $7,000 on the secondary

level the cost of the salary supplement for these teachers would be $783,900.

Independent Schools:—There are 176 elementary teachers and 141 secondary teachers.

Assuming the average annual salary for these teachers is $6,000 on the elementary level and $8,000 on the secondary level it is estimated the cost for these teachers would be $648,000.

Total Estimated Cost:—

Parochial Schools	783,900
Independent Schools	648,000
	$1,431,900

Bill states that the salary supplement shall be that percentage of the non-public school teachers current salary which equals the minimum level of support which the state provided to any city or town of the state under Title 16, Chapter 7. This is interpreted to be 30%.

Prepared by (Agency): Department of Education

Date: April 9, 1969

Plaintiffs' Exhibit No. 6

[Salary Supplement Act, as Introduced in General Assembly]

H 1765

State of Rhode Island and Providence Plantations

January Session, A. D. 1969

AN ACT Providing for Salary Supplements to Non-public Schoolteachers and in Amendment of and in Addition to Title 16 of the General Laws Entitled "Education," as Amended.

It is enacted by the General Assembly as follows:

Section 1. Title 16 of the general laws entitled "Education," as amended, is hereby further amended by adding thereto the following chapter:

"CHAPTER 49

"Salary Supplements to Nonpublic Schoolteachers

"16-49-1. Legislative findings—Declaration of policy.—The general assembly being charged by the constitution of this state with the duty not only of promoting public schools but also adopting 'all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education' makes the following findings: The public laws of 1960, chapter 27, declares: "It is the policy of the state of Rhode Island to provide a quality educatilon for all Rhode Island youth." This statute implements that policy by providing that the state shall assist the cities and towns by paying part of the operating revenues for the public schools.

But there are in Rhode Island approximately 45,000 children attending nonpublic elementary schools. They constitute about 25% of the total school population at these age levels.

Because nonpublic schools enroll such a significant portion of the total school population of the state, the state's policy of providing a quality education for all Rhode Island youth would be seriously impaired if the quality of education provided in said schools were to deteriorate.

Nonpublic schools are finding it increasingly difficult to maintain their traditional quality, due to rising costs. This is particularly serious with regard to the salaries of teachers; without adequate salary scales, no school can attract sufficient number of competent, dedicated teachers; and teachers are the prime factor in educational quality. These facts were recognized for the public schools in 1960, and dealt with by the passage of chapter 27 of the public laws of that year.

It is, therefore, the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike; within the limitations imposed by the constitutions of the United States and of Rhode Island. In pursuance of said policy, in order to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality, we hereby enact the following:

"16-49-2. Definitions.—As used in this chapter unless the context clearly indicates otherwise:

1. 'Nonpublic school' shall mean any school not operated for profit, other than a public school, within this state wherein a resident of this state may legally fulfill the compulsory school attendance requirements of the law.

2. 'Nonpublic schoolteacher' shall mean a teacher who teaches exclusively only those subjects required to be taught

by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, and any other subjects that are taught in public schools.

"16-49-3. Eligibility for salary supplement.—Every nonpublic schoolteacher shall, upon his or her request, be paid by the state through the department of education, a salary supplement in the amount fixed by law in such installments and at such intervals as shall be fixed by regulation promulgated by the commissioner of education. As a condition for the payment of such salary supplement the department of education shall be satisfied that the teacher:

1. Is one who teaches exclusively only those subjects required to be taught by state law to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, and any other subjects that are taught in public schools.

2. Has a teaching certificate issued by or under the authority of the state board of education in substantially the same manner that such certificates are issued to teachers in public schools.

3. Is receiving a salary which, including the salary supplement, meets the minimum salary standards for public schools required for eligibility under title 16, chapter 7 of the general laws of Rhode Island.

4. Is using only teaching materials approved for use by the public schools of the state.

"16-49-4. Amount of supplement—How determined.—The amount of salary supplement to be paid to an eligible nonpublic schoolteacher shall be that percentage of his or her current salary up to a maximum of $8,000.00 which equals the minimum level of support which the state provided in the preceding fiscal year to any city or town or school district of the state under the provisions of title 16, chapter 7 of the general laws, entitled "Foundation level school support".

"16-49-5. Regulation by department of education.—It shall be the duty of the department of education to promulgate regulations for the purpose of carrying out the provisions of this chapter. Such regulations shall include rules and procedures for making payments of salary supplements to eligible teachers; said regulations, however, must provide that said payments be made by the state directly to the teacher and not through the agency of the nonpublic school in which the teacher is employed. Such regulations shall also insure that the teacher is receiving the minimum salary provided for in section three of this chapter, and to that end the financial records of the nonpublic school pertaining thereto shall be subject to auditing by the state department of education.

"16-49-6. Annual appropriations—Disbursements.—The general assembly shall annually appropriate such sums as it may deem necessary for the purpose of carrying out the provisions of this chapter; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sums, or so much thereof, as may from time to time be required within the amount appropriated, upon receipt by him of proper vouchers approved by the department of education."

Sec. 2. This act shall take effect on July 1, 1969.

H 1765

Explanation

By the Legislative Council

This bill provides for the payment of salary supplements to nonpublic schoolteachers who exclusively teach subjects which are required by state law to be taught and a nonpublic school is defined as one which is not operated for profit.

Only a teacher who exclusively teaches a subject required by the state, who has a teaching certificate issued under the authority of the state board of education, and who is re-

ceiving a salary which, including the supplement, meets the minimum standards for public schools, would be eligible to receive the supplement.

The act also provides for the method of determining the amount of the supplement regulation by the department of education and an unspecified annual appropriation.

The act would take effect on July 1, 1969.

Plaintiffs' Exhibit No. 7

[Salary Supplement Act, as Approved by General Assembly]

R. I. PUBLIC LAWS (1969)

CHAPTER 246.

AN ACT Providing for Salary Supplements to Non-public Schoolteachers and in Amendment of and in Addition to Title 16 of the General Laws Entitled "Education," as Amended.

It is enacted by the General Assembly as follows:

Section 1. Title 16 of the general laws entitled "Education," as amended, is hereby further amended by adding thereto the following chapter:

"CHAPTER 51

"Salary Supplements to Nonpublic Schoolteachers

"16-51-1. Legislative findings—Declaration of policy.—The general assembly being charged by the constitution of this state with the duty not only of promoting public schools but also adopting 'all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education' makes the following findings: The public laws of 1960, chapter 27, declares: "It is the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth." This statute implements that policy by

providing that the state shall assist the cities and towns by paying part of the operating revenues for the public schools.

But there are in Rhode Island approximately 45,000 children attending nonpublic elementary schools. They constitute about 25% of the total school population at these age levels.

Because nonpublic schools enroll such a significant portion of the total school population of the state, the state's policy of providing a quality education for all Rhode Island youth would be seriously impaired if the quality of education provided in said schools were to deteriorate.

Nonpublic schools are finding it increasingly difficult to maintain their traditional quality, due to rising costs. This is particularly serious with regard to the salaries of teachers; without adequate salary scales, no school can attract sufficient numbers of competent, dedicated teachers; and teachers are the prime factor in educational quality. These facts were recognized for the public schools in 1960, and dealt with by the passage of chapter 27 of the public laws of that year.

It is, therefore, the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike; within the limitations imposed by the constitutions of the United States and of Rhode Island. In pursuance of said policy, in order to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality, we hereby enact the following:

"16-51-2. Definitions.—As used in this chapter unless the context clearly indicates otherwise:

1. 'Nonpublic school' shall mean any school not operated for profit, other than a public school, within this

state wherein a resident of this state may legally fulfill the compulsory school attendance requirements of the law, except such schools whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations as determined by the commissioner of education.

2. 'Nonpublic school teacher' shall mean a teacher who teaches in a nonpublic school exclusively only those subjects required to be taught by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

"16-51-3. Eligibility for salary supplement.—Every nonpublic school teacher shall, upon his or her request, be paid by the state through the commissioner of edution, a salary supplement in the amount fixed by law in such installments and at such intervals as shall be fixed by regulation promulgated by the commissioner of education. As a condition for the payment of such salary supplement the commissioner of education shall be satisfied that the teacher:

1. Is one who teaches in any grade from grade one through grade eight exclusively only those subjects required to be taught by state law to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

2. Has a teaching certificate issued by or under the authority of the state board of education in substantially the same manner that such certificates are issued to teachers in public schools.

3. Is receiving a salary which, including the salary supplement, meets the minimum salary standards for

public schools required for eligibility under title 16, chapter 7 of the general laws of Rhode Island.

4. Is using only teaching materials which are used in the public schools of the state.

5. Is one who does not teach a course in religion and who signs a statement in which he or she promises not to teach a course in religion for so long as or during such time as he or she receives any salary supplements provided for under the provisions of this chapter.

"16-51-4. Amount of supplement—How determined. —The amount of salary supplement to be paid to an eligible nonpublic schoolteacher shall be fifteen per cent (15%) of his or her current salary, which salary, including the salary supplement, is not in excess of the average maximum salary paid to public schoolteachers in this state as determined by the commissioner of education.

"16-15-5. Regulation by commissioner of education. —It shall be the duty of the commissioner of education to promulgate regulations for the purpose of carrying out the provisions of this chapter. Such regulations shall include rules and procedures for making payments of salary supplements to eligible teachers; said regulations however must provide that said payments be made by the state directly to the teacher and not through the agency of the nonpublic school in which the teacher is employed. Such regulations shall also insure that the teacher is receiving the minimum salary provided for in section 3 of this chapter, and to that end the financial records of the nonpublic school pertaining thereto shall be subject to auditing by the state department of education. Such regulations shall also insure that any nonpublic school, as that term is defined earlier in this chapter, which employs teachers who receive salary supplements as provided for in

this chapter shall comply with the provisions contained in title VI of the civil rights act of 1964.

"16-51-6. Commission to study aid to nonpublic schools.—There is hereby created a commission to consist of nine (9) members to be appointed by the governor, one of whom shall be designated by the governor as chairman. The commission is to study and evaluate state aid to nonpublic schools and is to report its findings and recommendations to the governor before January 1, 1970.

"16-51-7. Annual appropriations—Disbursements.—There is hereby appropriated out of any funds in the general treasury not otherwise appropriated the sum of three hundred seventy-five thousand dollars ($375,000.00), for the purpose of carrying out the provisions of this chapter; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payments of such sums, or so much thereof, as may from time to time be required within the amount appropriated, upon receipt by him of proper vouchers approved by the department of education.

"16-51-8. Severability.—If any clause, sentence, paragraph, or part of this chapter or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid or void, such judgment shall not affect, impair, or invalidate the remainder of this chapter or its application to other persons or circumstances.

"16-51-9. Liberal construction of act required.—This act shall be construed liberally in aid of its declared purposes."

Sec. 2. This act shall take effect on July 1, 1969.

Plaintiffs' Exhibit No. 11

[Application of Appellant John R. Earley]

Form 41 NPS
9/8/69

STATE OF RHODE ISLAND
DEPARTMENT OF EDUCATION

NON-PUBLIC SCHOOL TEACHER APPLICATION FOR A SALARY SUPPLEMENT GENERAL LAWS CHAPTER 16-49

Date 9/24/69

Certificate No. 34160 Social Sec. No. 039-22-4273

Name John Richard Earley

Address 5 Cumberland Road Riverside R.I. 02915
No. Street City State Zip Code

School St. Francis School

School Address 160 Orchard St., E. Providence

Subjects you teach Math, Science, Soc. Studies
Grade 4-5-6

Current Salary Including Salary Supplement $8000.00

Do you teach full time: YES × No

If not what percentage of the school week do you teach?

.....

Years of teaching experience 6

	Dates
School St. Cecilia's School Address Pawtucket	From 1965 To 1969
School Bay View Academy Address Ea. Prov.	From 1964 To 1965
School Holy Name Address Providence	From 1963 To 1964

Official Title of Agency by whom you are employed
St. Francis Xavier School

Statement of Eligibility

I hereby declare that I do not teach a course in religion and I promise not to teach a course in religion for so long as I receive a salary supplement from the State of Rhode Island and I further declare that I will use only teaching materials which are used in the public schools of the state.

Signature /s/ John R. Earley
Applicant

Date: Sept. 24, 1969

Approved: /s/ John R. Earley (Signature)
Principal

Date: Sept. 24, 1969

Plaintiffs' Exhibit No. 12

[Report of Expenditures and Membership By St. Francis Xavier School, East Providence, Rhode Island]

Form 31 NPS
September 8, 1969

STATE OF RHODE ISLAND
DEPARTMENT OF EDUCATION

NON-PUBLIC SCHOOL REPORT OF EXPENDITURES AND MEMBERSHIP GENERAL LAWS CHAPTER 16-49

SCHOOL: St. Francis Xavier School

ADDRESS: 160 Orchard St. East Providence, R. I.

July 1, 1969 to June 30, 1969.

SUMMARY OF CURRENT EXPENDITURES

100 Administration	$.....
200 Instruction	43,178.06
600 Operation of School Plant	9,726.72
700 Maintenance of School Plant	201.95
800 Fixed Charges	29,772.00
900 Auxiliary Agencies	.....
Total current expenditures for support of schools	$82,878.73
Number of pupils in Average Daily Membership in Grades 1 - 8.	483

Costs should be reported only for Grades 1 - 8.

If classes are conducted for grades in addition to Grades 1 - 8 pro-rate costs.

This report is due annually on August 1 for the preceding fiscal year. (See Commissioner of Education's Regulations II-B1).

Signed: /s/ Manuel de Rego, Pastor

Date: October, 1969

Plaintiffs' Exhibit No. 13

[Letter to Nonpublic School Principals, dated January 9, 1970]

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF EDUCATION

ROGER WILLIAMS BUILDING

Hayes Street, Providence, R. I. 02908

William P. Robinson, Jr.
Commissioner

January 9, 1970

To: Principals of the Non-Public School Addressed

FROM: Edward F. Wilcox, Associate Commissioner of Education

Last fall you received a copy of the Regulations of the Commissioner of Education covering the payment of salary supplements to non-public school teachers. Regulation B-2 states that each non-public school principal shall submit on January 15 a list of teachers in his school who have applied for a salary supplement.

Enclosed are two copies of this form. Would you kindly complete one and return it to this office as soon as possible. You may keep the other copy for your files. Please be certain that you place the teachers certification number in its proper place, and if the teacher has terminated his employment prior to the submission of the list, please indicate so under the column Period of Employment.

It is important that these forms be received on time because they will be used to complete the master list for submission to the State Controller's Office for payment of the salary supplement to the teachers whose names appear on the list.

If you have any questions, please call me at 521-7100/ Extension 681.

ENCLOSURES (2)

Plaintiffs' Exhibit No. 14

[Handbook of School Regulations.
Diocese of Providence]

HANDBOOK OF SCHOOL REGULATIONS DIOCESE OF PROVIDENCE

Office of the Superintendent

1965

Bishop's House
30 Fenner Street
Providence 3, Rhode Island

Foreword and Approval of the Handbook of School Regulations for the Diocese of Providence

The effectiveness of the education in the schools of this, and every other, diocesan system is determined in substantial part by the organization and coordination exercised at the diocesan level. Without central planning and uniform norms there would ensue overlapping efforts, uncoordinated programs, inarticulated curricula and multiple, divisive procedures. Accordingly, standardized policies and regulations respecting administration, curriculum, text books, etc. are necessary.

This handbook of regulations is the product of several years' study and revision on the part of experienced teachers, principals, and supervisors. It expresses the concensus of the instructional and administrative personnel. Apart from the benefits of order and coordination it will contribute to our schools as a system, it should provide individual principals and teachers with a host of practical suggestions.

I am pleased to approve this handbook and to direct that the regulations contained herein have the force of synodal law in the diocese. (Fourth Diocesan Synod, Statutes 1.4; 4; 351.1).

/s/ Russell J. McVinney
Bishop of Providence

September 8, 1965

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CHAPTER ONE

ADMINISTRATIVE AND TEACHING PERSONNEL

1. SCHOOLS SUBJECT TO THESE REGULATIONS

A. The schools subject to the regulations in this handbook are all parish and inter-parochial schools, both elementary and secondary.

1. A Parish school is one for which an individual parish is financially responsible.

2. An Inter-Parochial school is one for which a single parish is not responsible. It may be:

a. Diocesan—A school built by the diocese and operated from student tuition fees, but requiring diocesan resources for major alterations and repairs.

b. Private—A school whose administration and support are the responsibility of a religious com-

munity or a private corporation acting under the approval of the Ordinary of the diocese.

B. This handbook has received the approbation of the Ordinary of the Diocese of Providence and is effective immediately. Pastors, supervisors, and other school administrators should have a copy.

C. The handbook becomes the property of the school. There should be one copy in the principal's office, one in the convent, and one in each classroom. At the time of teacher transfers to other schools this handbook should not be removed.

[2] 2. The Catholic School Board

"The Diocesan School Board, with the Bishop presiding, shall supervise the education, both spiritual and secular, in the parochial schools and diocesan high schools." (*Fourth Diocesan Synod,* Stat. 351.1)

"Under the direction of the Most Reverend Bishop, the Diocesan School Board in conjunction with the Diocesan Building Commission shall review plans for the construction and equipping of schools." (*Ibid.*)

"The School Board shall have jurisdiction in all school policies, in the employment and dismissal of teachers, in fixing teachers' salaries and in the general conduct and discipline of schools." (*Ibid.*)

The Catholic School Board is the agency of the Ordinary for determining and formulating school policies. Its recommendations when approved by the Ordinary become mandatory for all schools subject to the regulations in this handbook.

The functions of the Board are similar to those of the state Board of Education and the city or town school committee.

3. The Superintendent, The Associate and Assistant Superintendents

"The Diocesan Superintendent of Schools is appointed by the Bishop to serve as Secretary and official executive of the School Board, and he is authorized to provide uniform courses of study and methods of instruction, to prepare examinations, to visit schools, and to receive notice of all changes in school personnel." (*Fourth Diocesan Synod,* Stat. 351.2)

"The instructions of the Diocesan Superintendent of Schools must be faithfully and accurately observed at all times." (*Ibid.,* 352)

A. The superintendent of schools is the agent of the Ordinary. It is his office to transmit and to implement the educational policies of the Bishop and the School Board. He should direct the progress [3] of the diocesan school system as a whole, including the organization of the school office and the administrative staff, the supervision of diocesan school personnel, the development of the curriculum and courses of study, the adoption of improved instructional aids and techniques, and assisting at the state and community level in the formulation and implementation of programs indicated in the Elementary and Secondary Education Act or other legislation.

B. The associate and assistant superintendents are appointed by the Ordinary to assist the superindent. Apart from sharing with the superintendent many of the responsibilities described above and on the following pages, they are charged with supervising the elementary and the secondary school programs, interviewing prospective lay teachers, devising testing and guidance programs, selecting textbooks, and evaluating the credentials of applicants for the Diocesan Honor Society.

C. Some of the duties of the superintendent and the associate and the assistant superintendents are as follows:

I. To consult with the Ordinary periodically, to advise him of present or future school needs, to submit to him an annual report on student enrollment, educational accomplishments and failures for the past year, specific objectives for the current year, administrative expenditures and resources and a proposed budget for the new fiscal year.

II. To prepare the agenda for the meetings of the Catholic School Board.

III. To direct and coordinate the efforts of the diocesan supervisors.

IV. To schedule bi-monthly principals' meetings.

V. To interpret and make effective state and diocesan educational directives.

VI. To determine the annual school calendar.

VII. To serve as liaison between the diocesan schools and educational, civic, and social organizations, the general public, and the news media.

[4] VIII. To ensure prompt and adequate communication between

a. the Ordinary and the schools of the diocese

b. the Catholic School Board or the School Office, and the pastors of parish schools, religious superiors, principals and teachers.

IX. To provide for the professional growth of school personnel by means of workshops, conferences, institutes, and especially inservice courses at Catholic Teachers College of Providence.

X. To issue certificates to elementary school principals and teachers of religion as required by diocesan regulations.

XI. To visit schools personally or through representatives.

XII. To assist in the solution of disciplinary and/or other problems referred to the School Office by the Ordinary, a pastor, or a principal.

4. The Pastor

"The pastor shall have full charge of the parochial school under the direction of the Diocesan Board of Education and the Diocesan Superintendent of Schools." (*Fourth Dioc. Syn.*, Stat. 353.1)

"Pastors and their assistants should regularly visit the parish school and give their assistance in promoting spiritual and intellectual discipline. In discharging this duty, special care must be exercised to avoid interference with the good order of the classes." (*Ibid.*, 355.1)

"No pastor may grant a holiday to the school children without the written permission of the Diocesan Superintendent of Schools." (*Ibid.*, 358)

"Pastors must see to it that the children of the parochial school are not frequently asked to sell tickets or solicit donations and that no child is ever discriminated against or embarrassed because of his failure to do so." (*Ibid.*, 362.3)

A. The pastor is ex-officio the chief administrative officer of a parish school. The immediate direction of the school and its instructional program is, however, usually delegated to the sister principal. Satisfactory and effective administration depends on the coopera-

tion and mutual support of both pastor and principal in matters of local educational policy. [5]

B. In addition to the responsibilities described in the synodal canons cited above, the following obligations devolve upon the pastor:

I. Maintenance of school buildings, grounds, and equipment by means of adequate repairs and sufficient custodial services.

II. The provision of necessary facilities and supplies, including a school telephone, a fire detection system, and all devices requisite for complete fire safety.

III. Adherence to diocesan school regulations concerning the school calendar, the length of a school day, the size of elementary school classes, a non-teaching principal in a school with more than six classrooms, the establishment of a Home and School Association or a similar parents' association in every parish which has a school; the use of a written contract between a lay teacher and the school, the employment of lay teachers approved by the school office.

IV. The recruiting of needed lay teachers unless he has deputized the school superintendent in writing to act as his agent in procuring teachers, and the payment of a salary to lay teachers which accords with the current salary schedule established by the Catholic School Board.

5. Diocesan and Community Supervisors

All the schools of the diocese are visited by supervisors from the religious community which staffs the school. Elementary schools are also visited by diocesan supervisors, sisters chosen from communities whose members teach in the diocese. The latter are representatives of the superintendent of schools.

A. As a rule, community supervisors visit a school annually. Diocesan supervisors call upon a school at least twice a year for general supervision, and several times a year for supervision in a particular subject such as mathematics, music, or French. The length of time for supervising a school is determined to a considerable degree by the size and the experience of the staff. Obviously to supervise twenty teachers requires more time than to supervise ten, and a novice teacher should require a longer visit than an experienced teacher. [6]

B. Although supervisors may be required by their superiors to report from time to time about conditions in the schools, the primary work of the supervisors is not inspection. Rather it is to assist the teacher in the problems of instruction.

C. To the end that there may be no conflict in authority between the diocesan school system and a religious community, the function of a community supervisor in the schools of the Diocese of Providence is specified as follows:

I. To become well enough acquainted with the teachers of their communities so as to be able to advise the community superiors on matters of placement and reassignment.

II. To act as liaison between the provincialate and the religious teacher in the school.

III. To cooperate with the superintendent by studying the diocesan school regulations and to encourage the teachers of their community to observe these regulations.

IV. To avoid giving any orders or directions to the teachers of their community that may be in conflict with diocesan regulations or policy regarding cur-

riculum, testing, textbooks, method, or administrative matters.

V. To refer questions concerning school administration beyond the scope of their own authority to the proper diocesan school authorities, namely, the superintendent of schools or the pastor.

D. Principals and teachers should endeavor to make the visits of all supervisors as pleasant and profitable as possible. (For regulations concerning the visits of diocesan supervisors see Appendix A).

E. Each school has the responsibility to see to it that transportation is provided for a diocesan supervisor to her next destination.

F. Community supervisors are encouraged to call on the superintendent of schools upon the completion of their school visitation. Their observations and suggestions will be gratefully received. [7]

6. The Principal

The principal has the major responsibility for the educational effectiveness of the school and the coordination of all work in all departments.

A. It is the duty of the principal to observe implicitly administrative instructions issued by the superintendent and to give loyal support to his policies at all times. This includes keeping files so as to provide his or her successor with current information needed for continuity. (See Appendix B)

B. Some of the more important responsibilities of the principal are as follows:

I. To see that the diocesan educational program is followed by all teachers, and in parish schools to confer regularly with the pastor concerning school matters.

II. To see that the school records are properly filled out and safely kept.

III. To send required reports and requested information to the School Office promptly, including the emergency employment of a teacher. (see page 10)

IV. To accord to all lay teachers equal status, rights, and opportunities for advancement as those enjoyed by religious teachers.

V. To make the necessary arrangements with the health officers and other public officials so that the pupils in the school receive whatever health and social services are available.

VI. To see that regulations regarding fire drills are observed.

VII. To see that the required intelligence and other tests are administered.

VIII. To supervise the teaching in the school (special attention should be given to the younger teachers), and to make available to all teachers opportunity at regular intervals for private consultations.

IX. To hold regular faculty meetings. The primary aim of the faculty meeting is the improvement of instruction. No faculty meetings may be held from which lay teachers are excluded. [8]

X. To confer with parents regarding problems affecting their children.

XI. To see that occasional publicity in the press is given to the work of the school.

XII. To consult with the superintendent when local circumstances suggest the advisability of deviating from the school calendar or diocesan regulations.

C. In virtue of a ruling by the Diocesan School Board every principal of a school which has more than six classrooms must be a free or non-teaching principal.

D. A non-teaching principal may replace a classroom teacher who is ill or otherwise absent, but not for more than a total of five days during a given sickness or absence.

7. The Classroom Teacher

The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher. Pope Pius XI expressed this thuoght very clearly in his encyclical, Christian Education of Youth:

> Perfect schools are the result not so much of good methods as of good teachers who are thoroughly prepared and well-grounded in the matter they have to teach; who possess the intellectual and moral qualifications required by the important office; who cherish a pure love for the youth confided to them because they love Jesus Christ and His Church, of which these are the children of predilection; and who have, therefore, sincerely at heart the true good of family and country.

A. Although religious teachers constitute the greater part of the teaching staff in the elementary and secondary schools of the diocese, the number of lay teachers in our schools is increasing with each year. Lay teachers are, no less than religious, an integral part of the Catholic educational structure. Once a teacher enters a classroom, his or her professional competence and dedication to the highest spiritual and cultural interests is what matters, whether he [9] or she be a priest, a religious, or a layman. Every effort should be made to indicate to lay teachers the esteem, the confidence, and the warmth in which they are held. In par-

ticular, they should be invited to participate in all faculty meetings and workshops.

B. Among some of the more apparent obligations a teacher should observe are:

I. Following the diocesan educational program, using the approved textbooks, observing all pertinent regulations contained in this handbook.

II. Cooperating with the directives of the principal in all school matters.

III. Making use of available educational aids, including school facilities and free materials such as the audio-visual aids obtainable at the Rhode Island Department of Education.

IV. Fulfilling supplementary duties which from time to time are assigned to a teacher.

C. Effective September, 1966, the teaching of prescribed courses in religion in the Catholic elementary and secondary schools of the Diocese of Providence is limited to those who hold a certificate for teaching that subject from the diocesan School Office.

8. Employment of Lay Teachers

"No one may assume the office of teacher in a parochial school or diocesan high school who has not been approved by the Diocesan School Board. (*Fourth Dioc. Syn.*, Stat. 357)

A. With respect to elementary schools, the School Board has ruled that before being hired a teacher must be registered with and personally interviewed by the superintendent or associate or assistant superintendent.

I. The fact that an applicant previously taught in a school of the diocese does not constitute approval

by the superintendent or his delegate. Explicit approval by the superintendent or his delegate is still required before such applicant may be employed. [10]

II. Part time, special-subject, and substitute teachers must be approved by the superintendent or associate or assistant superintendent, as well as full time teachers.

III. In an emergency the following apply:

a. If the emergency will apparently be limited to no more than five school days, a certified teacher or one who has had at least one year of teaching experience at the proper grade level, may be employed without a previous interview by and approval of the superintendent or delegate (the superintendent must be notified immediately however).

b. If the emergency will clearly be of one day's duration, a teacher who is not certified or who has not a year or more of classroom experience may be employed for that single day without the prior approval of the School Office. The principal must notify the School Office by telephone during the day.

B. In order to qualify for approval by the superintendent or his delegate, a teacher must have a bachelor's degree and some educational preparation and/or experience.

I. A secondary school teacher must have, in addition, a major or its equivalent in the subject area in which he is engaged to teach.

II. An elementary school teacher may be exempted from the requirement of a degree, provided he has acquired ninety college credits towards the degree

(the equivalent of three years of college), including credits in several education courses, and has had six weeks of supervised practice teaching or one or more years' experience in classroom instruction. He must earn at least six credits annually towards the degree, once he has been employed.

III. A former religious who has had three or more years of experience as a classroom teacher may receive a special exemption from the requirement of a degree because of his or her added training, provided such a one have at least sixty credits, including a number of basic education courses. [11]

C. Lay teachers employed in elementary and secondary schools should be placed under contract. Model forms of such contracts may be found in Appendices C and D. Contracts should be renewed no later than April 1, but there should be no renewal unless the teacher concerned has given evidence of competency and professional growth during the period of employment.

D. A lay teacher may freely seek employment in another diocesan school provided he fulfills the terms of the contract he has made with the school currently employing him. If he makes known to the superintendent his desire to teach in another school upon the completion of the academic year in his present school, he will be happy to assist him in the choice of another teaching position.

E. Common courtesy demands that no pastor or principal approach a lay teacher in another school with a teaching offer without first informing the pastor or principal of the school in which that teacher is employed.

F. A suggested minimum salary for lay teachers in elementary schools is determined and published from time to time and is reviewed annually by the School Board.

(see Appendix E) Presumably secondary school teachers will, in general, receive a higher salary.

G. The salary agreed upon shall be stated in terms of an annual salary and shall be paid in installments on a semi-monthly basis on the first and fifteenth of the month, or the second and sixteenth should a legal holiday fall on the first or fifteenth. For a teacher employed for a full academic year, the first payment is due on the first day of October and the final payment on the fifteenth day of the following July.

H. To the end that teachers have some security, no lay teacher who has taught in the same school more than two years may be discharged solely for the purpose of employing another teacher at a lower salary.

I. Whenever a teacher is to be dismissed during the school year, the superintendent of schools should be notified. [12]

J. Each full time lay teacher shall be entitled to ten days sick leave without deduction in pay. However, for the first five months he has been employed, a teacher shall be allowed only one day of sick leave with pay per month, this on a cumulative basis. A teacher may accumulate as many as, but no more than, thirty days of sick leave with pay.

K. Teachers who are over seventy years of age should not, as a general rule, be employed in diocesan schools. This is a rule that admits of some exceptions. However, experience within our school system and the universal advice of public school administrators support the general rule. Teachers over seventy usually are inferior in the classroom; they are unable to adjust to new methods, new text books, etc., and they are less patient with pupils. [13]

CHAPTER TWO

ADMINISTRATIVE PRACTICES

1. The School Calendar

"The Annual School Calendar has the approval of the Diocesan School Board. No holiday, nor partial holiday, shall be given without obtaining the written permission of the Superintendent of Schools."

A. The calendar published annually by the superintendent is the official calendar for the schools of the Diocese of Providence. It is to be faithfully observed. Permission must be obtained from the School Office to deviate from it.

B. The calendar accords with Rhode Island educational law which affirms that the school year shall contain at least 180 days (Gen. Laws of 1956, 16-2-3) and with the calendar drawn up by the Rhode Island Association of School Superintendents.

C. Provision is made in the calendar for making up a school day session canceled because of a storm or other emergency, by fixing the closing day of school several days beyond the 180th day. If in the course of the year no sessions are canceled, the school year will end several days earlier than the fixed day.

D. The following practices are to be observed with respect to the cancellation of a school day session and/or its being made up.

I. Summer retreats, June workhops, etc., should not be scheduled for religious teachers in the Diocese of Providence on the premature assumption that the school year will end no later than the 180th day of the school calendar; no teacher may absent himself from school to attend an activity so scheduled.

II. On a stormy day the decision as to whether a school should open for class sessions is to be based on the rule: Adopt the decision made for the local public schools. [14]

III. The decision of local authorities to close the schools for reasons other than a storm or similar emergency is not to be followed. On such occasions the customary bus services should be provided.

IV. Canceled school days should be made up at the end of the school year; they may not be made up during the February or April vacation week without express permission from the superintendent of schools.

2. The Length of the School Day

A. Following the school calendar means not only having school on the day specified by the calendar, but also having a full day session.

I. A full day session for Catholic schools at the elementary level consists of five and one-half hours, exclusive of lunch and Mass,* but inclusive of recess for pupils in grades 1-3.

II. A full day session on the secondary school level is at least six hours.

B. The ruling of the State Board of Education that a calendar day means, excluding lunch or recess time, five hours for elementary and five and one-half hours for secondary schools makes it illegal to account a half-day or a partial day a calendar day. Early dismissal or whole or partial holidays may not be granted with-

* The use of school time to participate in the Holy Sacrifice of the Mass on the feasts of All Saints, Ascension, and the patronal saint of the parish or school, as well as during the 40 Hours Devotion, is proper and commendable. (See also under *Religious Activities*, page 17)

out express permission of the School Office. Even then, the class time lost must in most instances be made up.

C. Class time regularly lost, e.g. because of weekly released time sessions during the established school hours, must be made up.

D. When the school is used regularly for social activities, classes may not be dismissed early in order to arrange for the social. [15]

3. The Opening of School in September

A. A suitable votive Mass, e.g., one in honor of the Holy Spirit or the patron saint of the school, should be celebrated at the beginning of each school year.

B. The first day or two of school may be devoted to the distribution of books and supplies, the organization of classes, the collection of health cards, and the other activities specified in Appendix F.

4. Faculty Meetings

Faculty meetings shall be held at least once a month, preferably more often. All teachers, lay as well as religious, shall be present. The problems of school administration should receive the least discussion possible. It is recommended that digests of practical articles from current professional periodicals be prepared and discussed, and methods of teaching be evaluated.

* * * * * * * * * *

6. Course of Study

Whenever there exists a course of study, syllabus or teacher's manual that outlines or otherwise defines the scope of an elementary or secondary school course, its use is mandatory for all who teach the course. Exceptions

to this regulation are granted; such exceptions should be sought in writing from the School Office.

• • • • • • • • • • •

[16] 8. Religious Instruction

A. Systematic religious instructions must be provided in all schools of the diocese.

B. Modern catechetics requires a teacher with unusual aptitudes, specialized training, and such unction of the spirit that his words possess the force of a personal call. He should be so filled with his subject that he can freely improvize in discussion, dramatization, drawing, song, and prayer. A teacher so gifted and so permeated by the message of the Gospel is rare. Perhaps no teacher in a given school attains that ideal. But some teachers come nearer it than others. If our pupils are to hear the Good News so that their minds are enlightened and their hearts respond to the love of God and His Christ, if they are to be formed into vital, twentieth-century Christians, they should receive their religious instructions only from the very best teachers.

C. Inasmuch as the textbooks employed in religious instruction above the fifth grade require a high degree of catechetical preparation, religion should be a departmentalized subject in grade six through twelve.

D. Effective September, 1966, teachers of religion in grades six through twelve must be certified by the superintendent of schools.

9. Religious Activities

Religious formation is not confined to formal courses; nor is it restricted to a single subject area. It is achieved through the example of the faculty, the tone of the school, the manner in which the curriculum is taught, and religious activities.

[17] A. Care should be exercised against unreasonable use of school time for religious activities. A liturgical observance of a Holy Day, Mass on a first Friday, or the Stations of the Cross on the Fridays of Lent would seem reasonable. But to schedule daily or Lenten Mass for student participation during school time is unreasonable and is forbidden.

B. Similarly, there should not be a multiplicity of prayers or lengthy prayers, such as the Rosary, during school time. (For recommended prayers see page 39)

* * * * * * * * * *

[19] 14. Releasing Pupils to Attend Funerals

A. In the event of the death of any member of the clergy of the parish, or any one of the teaching sisters in the parish school, classes may be dismissed on the day of the funeral. It is to be understood that the children are to assemble and assist at Holy Mass for the deceased on that day.

B. When a member of the faculty of a high school dies, the students of his or her home room and/or other students chosen at the discretion of the principal may be released to attend the funeral services.

[20] C. The elementary or high school principal should determine which pupils should represent the student body at the funeral services of a pupil of that school. A class may be allowed to attend the funeral of a parent of a pupil in that class.

* * * * * * * * * *

16. Discipline

A. Discipline is a fundamental in Catholic education as it is fundamental in Catholic life. The only discipline that is worthwhile is that which is prompted by motives from within. Discipline is not regimentation; neither

does it imply a detailed surveillance of every action of the child. Correct training in discipline means that the young child must act in conformity with controls imposed by parents, teachers, and others in authority.

B. The following are suggested as means to classroom discipline:

I. Well-prepared classes tend to lessen disciplinary problems.

II. Voice control is important to class control.

[21] III. Positive, rather than negative motives elicit favorable response from most children; rewards and encouragement are more efficacious than threats and punishment. The positive approach in the correction of faults is suggested.

IV. An understanding of, and sympathy for, each individual pupil is of utmost importance.

V. Individual differences should be recognized and provision made for them.

VI. An individual conference with the pupil is recommended.

VII. Better understanding of the pupil results from parent-teacher conferences.

VIII. Withdrawal of privileges and removal from positions of responsibility are effective measures.

C. No teacher shall impose a fine as a means of punishment.

17. Expulsion of Pupils

The expulsion of a child from a Catholic school is a serious matter and should be invoked only as a last resort. The fact that a child presents a behavior problem is not in itself a sufficient reason for expelling the child. An

effort must be made to find the cause of the trouble. The social worker, the physician, the psychologist, and the psychiatrist can be of assistance in determining the cause of misbehavior. Frequently the cause is one which can be removed and the behavior problem solved. In such cases expulsion will not solve the problem, but may only aggravate it by removing the child from the influence of a Catholic school environment.

A. Every case of expulsion is an admission that even with religion in our program, we are unable to correct the trouble. Nevertheless, cases arise when expulsion is justified (see page 56 regarding high school expulsions). While it is not possible to settle all cases that would arise in this connection, two general conditions may be laid down that would justify an expulsion:

[22] I. Delinquency and immorality that would warrant commitment to a correctional institution, or would constitute a definite menace to the morale of the school.

II. Incorrigibility and persistent irregular attendance.

B. Before a pupil may be expelled from school, the parents must be notified. The parents should be asked to call at the school. Every effort should be made to enlist the cooperation of the parents in order to save the child and avoid invoking the extreme penalty of expulsion.

C. The following rules apply to elementary schools:

I. Before invoking expulsion, the pastor should make use of whatever resources are available to study the case.

II. No case involving possible expulsion shall be reported to the superintendent of schools without the knowledge and consent of the pastor.

III. Pending settlement, the superintendent may, in cases referred to him, authorize the temporary suspension of a pupil whose presence in school would constitute a menace to the other children.

IV. Within twenty-four hours of an expulsion, the name of the student and the reason for the expulsion shall be sent to the superintendent.

V. Whenever a student is expelled, the principal shall notify the public school superintendent of the city or town in which the student resides. (*unless that student is over 16 years of age*)

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[27] 26. CORRESPONDENCE

The principal is personally responsible for all correspondence bearing on school matters and shall have knowledge of all communications from the school. A copy of the correspondence shall be retained in the principal's office.

A. The signature on business correspondence should be that of a person, not, for example: The Sisters of....

B. Teachers shall not communicate with parents or public officials in writing or by telephone except with permission of the principal. Routine communications, however, may be delegated to teachers by the principal.

C. All correspondence to the state Department of Education must be channeled through the diocesan School Office.

27. OFFICIALLY ADOPTED TEXTBOOKS

The diocesan superintendent of schools, assisted by textbook committees, is responsible for the adoption of textbooks.

A. Official adoptions of textbooks are frequently made for some subjects both on the elementary and the second-

ary level. The use of such texts is mandatory on all schools. With regard to adopted textbooks:

I. When more than one text is adopted, a school may use any book so listed.

II. Texts in current use when a new adoption is made may continue to be used until they are worn out, provided it is not over three years from the time the new adoption took effect.

III. The superintendent may in special cases, especially for trial purposes, authorize the use of another textbook.

B. Recommended textbooks are often made, usually several for a given subject. A school is free to use anyone of the several recommended texts, but it must confine its choice to one of the recommended texts unless it has permission from the superintendent to do otherwise.

[28] 28. Textbook Law

A. State law requires each community to lend, free of charge, selected textbooks in science, mathematics, and modern foreign languages to any elementary or secondary student who resides in that community and who applies for the book according to procedures established by public school officials. It is imperative that principals and teachers, pastors, parents, guardians and others recognize that the non-public, including the Catholic, school is not a party to the loan and should not become involved in the transaction.

B. The following regulations are directed towards ensuring the non-involvement of diocesan schools in the loan of such textbooks:

I. No pupil shall be admonished, exhorted, or urged in any manner by any pastor, curate, principal, teacher, or other school official to apply for the loan of such a textbook or to procure a text for which he has already applied. The principal and/or the teacher

should explain to the pupil and his parent or guardian that the pupil is free to purchase the textbook from the school or to receive it on a loan basis from the city or town.

II. Every pupil shall be informed by his principal and/or teacher, no later than April 15 of each year (or in the case of applicants who have not been registered or accepted by April 15, as soon as possible), as to the title, author, publisher, and edition of the textbook in science, mathematics, or modern foreign language which he will use the following school year. In all likelihood that text will be available on a loan basis to the pupil from his community because in the selection of adopted or recommended texts in science, mathematics, and modern foreign languages the diocesan superintendent is guided by the list of textbooks approved for such loans, which is published annually by the state Commissioner of Education.

III. No student shall be coaxed, warned, enjoined or pressed in any manner by his principal, teacher, or other school official to return the textbook lent to him by the community. Each teacher should, however, shortly before the close of school remind students that honesty and the virtue of Christian responsibility demand the return of borrowed objects, such as library books or textbooks.

[29] IV. A principal shall not, even though requested to do so, send to the local public school authority a list of the pupils in her school and the science, mathematics, and modern foreign language text that each will need for the coming school year; nor shall she give an estimate of the number of pupils at each grade level who will need such textbooks. She may upon request give public school administrators the actual enrollment of pupils in each grade, for this is public knowledge; and she may verify the title, author, publisher or edition of a particular textbook in use or to be used in her school.

29. Guidance

Guidance shall be an integral part of the curriculum of the Catholic Schools of the diocese. The program shall be formal and explicit in the secondary schools, but must also show prominence in the elementary schools.

A. The guidance program shall not only concern itself with curricular problems and vocational aspirations and abiliies, but also with personal and religious counseling.

B. Besides the guidance director, every teacher shall be concerned with guidance. Consequently, all teaching personnel shall have knowledge of the basic facts concerning each child, including attitudes, abilities, and environment.

C. Co-operation between guidance personnel and faculty is of utmost importance for the effectiveness of this program.

30. Vocations

Students should be taught to appreciate all vocations: marriage and family life, single life in the world, and religious life. They should be made aware of the immense importance to the Church of vocations to the priesthood and to the religious life. They should understand how great is the need for religious vocations, and the necessity of asking [30] God for the favor of a greater number of vocations. The teacher can help recruit vocations by

A. Inculcating in the pupil a habit of praying for vocations.

B. Giving the pupil a knowledge of the work done by a wide variety of religious communities of men and women.

C. Appreciating his own importance in building correct attitudes toward the priesthood and religious life.

D. Having a professional attitude toward his work and radiating a spirit of happiness and satisfaction.

31. Vocation Talks

Requests from outside speakers to talk on vocations must be referred to the Director of Vocations. No unauthorized priest (except priests of the respective parish) is permitted to address the pupils of any school in the Diocese. An authorized priest is one who has received specific permission from the Chancery, the Superintendent of Schools, or the diocesan Director of Vocations.

32. Mission Program

The primary objective of the Mission Program in both the elementary and secondary schools should be the forming of mission-minded Catholics. Mission activities will be furthered by teachers, who being mission-minded, integrate mission information with their teaching. This is especially true in the social sciences, as well as religion.

33. Retreats

A. Retreats and days of recollection form an integral part of our religious program in the Catholic schools. In the minds of the faculty and students, the retreat should be one of the biggest events of the year. Students should be notified well in advance concerning the time of the retreat and the purpose of the retreat.

B. It is recommended that seniors, and perhaps juniors, in secondary schools where the class enrollment will permit, make a retreat whose format is a modification of the cursillo.

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[32] 35. Public Relations

A. Public relations signifies the sum total of all impressions made by the school itself and by the various persons connected with it.

B. The following suggestions are offered as means for attaining good public relations:

I. Educational excellence — the quality of classroom teaching cannot be concealed; it is a favorite subject for local conversation.

II. Participation in community activities, including educational conferences, panel discussions, and work shops, and race relations, anti-poverty, and approved ecumenical programs.

III. Open house programs to which the public is invited, especially neighborhood school administrators and teachers, members of local P.T.A., etc.

IV. Judicious releases concerning significant school activities or accomplishments to the news media, in particular The Providence Visitor.

V. Open and courteous communication with parents with the provision for

a. Frequent conferences, at hours convenient to all concerned to discuss pupils' problems.

b. A fair hearing on the part of the principal and teacher regarding complaints and criticism.

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[35] 39. Salesmen Visiting Schools

A. When salesmen call at a school, the principal will often ask them for some evidence from the superintendent of schools for authorization to visit the schools. For the guidance of pastors, principals, and teachers, the following is the diocesan policy in such matters:

I. The superintendent of schools has no right to forbid any salesman to represent his products in our schools. On the other hand, any specific written authorization to do so may be distorted into an endorsement of the product offered for sale. Hence, the superintendent will not issue a letter to a salesman when it is a question of merchandise which can be examined before it

is purchased, i.e., books, charts, globes, teaching materials, etc.

II. On the other hand, a letter may be given when it is a question of something which cannot be examined by the individual principals before it is actually used in the school, i.e., a lecture or entertainment program.

B. Occasionally the superintendent may want to recommend a book or item of teaching equipment. When this is done, it will be by means of the diocesan school bulletin.

40. Death Notices

The School Office should be notified of the death of any members of the faculty (priest, brother, sister, lay teacher) who has been associated with the schools of the diocese, in order that prayers for the deceased may be recommended in our news letters.

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[37]

CHAPTER THREE

POLICIES AND RULES PROPER TO ELEMENTARY SCHOOLS

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2. Classroom Enrollment

A. The number of pupils in a classroom may not exceed forty.

B. The Catholic School Board is aware that this ruling places many pastors in a difficult position. Unhappily, they must turn away children who wish to attend parochial school because the number seeking admission to a given classroom is greater than forty. The Board is convinced after careful study that, however harsh the ruling may seem, it is necessary. Due regard for individual differences among pupils, for proper classroom management and for the physical, emotional and mental well-being of the teacher requires that the

maximum number of pupils in a classroom be not more than forty.

3. When More Than Forty Apply for The First Grade

When the number of applicants for the first grade exceeds forty per classroom, the following suggestions are offered to help pastors select those pupils who will enter the first grade in September:

A. Use the Metropolitan Reading Readiness Test or similar test at pre-registration sometime in March, April or May. This should eliminate children who are likely to be failures during the first year. [38]

B. If there are still more applicants than can be accepted, take the forty oldest children. This is arbitrary, but it has one advantage: the older children are not as likely to fail in the first grade as the younger ones.

C. Although wealth should never serve as a criterion for accepting a pupil into a Catholic school, all other things being equal, it would seem fair to give preference to a child whose parents support the parish. Regular use of the budget, rather than the size of the contributions, would appear equitable. It indicates whether parents regularly attend Mass.

D. When a child fails in the first grade, he should be allowed to remain in the school and repeat the grade.

E. Where there are kindergarens, promises of entry into the first grade should not be made until the number of possible first grade failures has been ascertained. The total number in the first grade, including the repeaters, should be no more than forty. The Metropolitan Reading Readiness test is a good way to decide which kindergarten children should not be accepted into the first grade.

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[39] 5. Tardiness

A. The prevention or correction of habitual tardiness is the responsibility of the parents, pupil, teacher, and principal. On occasion a conference between the teacher or principal and the parents should be arranged to correct repeated tardiness.

B. A pupil may not be accounted tardy if he is late for Mass, but is on time for the opening of school.

6. Daily Prayers

The following schedule would seem to provide a reasonable sufficiency of daily prayers and to conform to the principle ennunciated under *Religious Activities* (see page 17):

A. Opening of the School Day: *Morning Offering, The Lord's Prayer, Hail Mary,* and the *Apostles' Creed.*

B. After Recess (grades 1-3): *The Memorare*:

C. Noon dismissal: *The Angelus,* the Doxology: *Glory be to the Father, etc.*

D. Beginning of Afternoon Sessions: *Acts of Faith, Hope,* and *Charity, The Confiteor.*

E. Dismissal: *The Act of Contrition.*

7. Time Allotment of Subjects

A. The major subjects in grades 4 through 8 are religion, English, reading, mathematics, science, and social studies. The minor subjects are spelling, penmanship, a modern foreign language, physical education, music, and art.

B. A schedule which indicates the weekly time allotment to each subject and which provides in some detail clear, meaningful, and manageable daily programs in conformity with the weekly time allotment will be reviewed annually and furnished to each teacher before the beginning of each school year.

C. Where there is more than one grade in a room, the school must adjust its program as best it can to the diocesan course of study and time schedule. Subjects might be alternated, e.g., when the the seventh grade and eighth grades are combined, both grades would be well advised to take seventh grade social studies one year and the eighth grade work the next year.

* * * * * * * * * *

[44] 20. Home and School Association

By order of the diocesan School Board there must be in every parish which has an elementary school a Home and School Association, or a similar group of parents whose children attend the school. Among the more important purposes of such an organization are:

A. Promoting among parents and teachers a deeper appreciation of Catholic education.

B. Exerting leadership within the community towards bettering the environment educationally and morally.

C. Assisting parents in the solution of common problems of child behavior.

D. Making clear to parents and teachers their mutual educational responsibilities.

E. Fostering increased cooperation between parents and teachers in the discharge of their responsibilities.

[45] 21. Parent-Teachers Conferences

A. Shortly after the first-quarter examinations there shall be a private conference between the teacher and the parents of each pupil. A schedule of such conferences should be arranged so as to allow a fifteen minute period for the parents of each child and the parents should be invited to come at a specified time. At this conference the student's achievement in the light of his

ability, his strengths, and his weaknesses should be discussed.

B. It is recommended that a second conference be held with the parents at the end of the third quarter.

C. At the pastor's discretion the report card might be distributed to the parents on the occasion of the conference.

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[47] 27. Pupils Requiring Special Instruction

There are some pupils who require special instruction because of some physical or mental handicap. The physical handicap may be subnormal hearing or eyesight, or a physical impediment which requires special transportation to school for the physically handicapped. The mentally handicapped are those who cannot profit by regular classroom instruction, but can succeed in special classes arranged for children of this type. Since facilities are not available in the parochial schools for the care of such children, arrangements may be made for their entrance into a public school that may have facilities available. It is the responsibility of the pastor to see that their religious instruction is continued.

[48] • • • • • • • • •

29. Eighth or Ninth Grade Graduation

A. Since leaving he eighth or the ninth grade no longer represents the end of formal education, graduation exercises on the completion of the eighth or the ninth grade do not have the significance they once had. Their elimination is to be encouraged. Instead, the pastor might distribute a diploma or a certificate in the manner he distributes report cards. A Mass and Communion breakfast would be very appropriate. Every effort should be made to keep expenses at a minimum. Class pins or rings, expensive picture taking, etc., are forbidden.

B. No graduation or other exercise which signifies the termination of school sessions may take place earlier than a week preceding the closing date of the school year; this in accordance with the recent ruling of the state Board of Education concerning calendar days of the school year.

C. Only the official diocesan diploma may be distributed within or without graduation exercises. Whether there should be a diploma at all is left to the discretion of the pastor.

D. The eighth or ninth grade student who is to receive the kind of promotion described above under *Special Promotion* may participate in the Graduation Exercises, if they are held. He may receive a diploma. But it should be made clear to him and his parents or guardian that the diploma does not signify readiness for regular high school courses, and that the notation stated above will be sent on with his report card.

E. A transcript of the seventh and eighth grade marks, personal and test data, and health record should be sent to the high school the elementary school graduate seeks to enter or has entered.

[49] • • • • • • • • •

31. Altar Boys

The minimum number of boys required by the liturgy for funeral Masses or other functions during school hours may be excused from class. Careful attention should be directed to the end that:

A. The boys selected are those who can be absent from class with the least harm to their studies.

B. Assignments for serving at funeral Masses are rotated so that the same pupils are not consistently absent from classes.

C. Altar Boy rehearsals may not be held during school hours.

32. Choir Boys

Choir boys should not be released from school to sing at a funeral Mass. Nor should they engage in rehearsals during school hours except for the period allotted for the teaching of school music.

[61]

APPENDIX A

Suggestions for Receiving a Supervisor

1. When the Sister Supervisor calls to arrange for a visit, she should be asked if she wishes a tentative program for class visitation ready, and if she desires to hold a faculty meeting.
2. A list of the names of the faculty members, together with the grades they teach and their room numbers, should be prepared for her visit.
3. Permanent record cards and time schedules should be available.
4. It is recommended to have ready, in case they are requested, lesson plans, records of grades, and samples of children's work.
5. The children should be informed of the name of the supervisor so that they may greet her properly when she enters and leaves the classroom.
6. It is advisable to instruct the entire class on how to hand a book to a visitor, even though only one child is appointed to present the textbook.
7. When the supervisor leaves the room, it is often helpful to have a child accompany her to the next class or to the office.
8. Teachers are urged to ask the supervisor, upon the completion of her visit, if she has any suggestions.
9. When the supervisor leaves the school after the visit, transportation should be provided for her, unless she has made other arrangements.

[62]

APPENDIX B

Administrative Information for Incoming Principals

It is incumbent upon all principals to have the following information on file and up to date so that it will be immediately available:

1. Aggregate attendance
2. Book orders
3. Business firms where purchases are made (uniforms, supplies, miscellaneous materials)
4. Confraternity of Christian Doctrine information: participating public schools, records used, etc.
5. Minutes of faculty meetings
6. Insurance data: Amount of student accident insurance premiums collected, deposited, and forwarded to the School Office; list of pupils (see regulations pertaining to Student Accident Insurance, chapter two, number twenty); accident forms.
7. Lay teachers: their name, address, phone, salary, contract, academic and professional background, etc.
8. Organizations: how registered, i.e., individual or school, etc.
9. Patrol boys
10. The names of, the officers of, and pertinent data concerning the Home and School Association or similar groups
11. Promotion lists
12. Registration time and procedure for Grade 1
13. School handbook
14. Special collections permitted
15. School health data: name, address, and telephone number of school physician, dentist, nurse and other school health officials, e.g., psychologist, speech therapist; a copy of written school health policies and standing orders (see chapter two, number eighteen)
16. Tuition rates

[63]

APPENDIX C

Proposed Contracts for Lay Teachers of Regular Class Groups

Articles of Agreement

Made in ....., Rhode Island on the .....
(city or town)
day of ....., 19.... between .....
pastor of ..... Church (hereafter called the first party) and ..... residing at .....
(teacher) (street,
..... (hereafter called the second party).
city or town and state)

Witnesseth

1. The first party hereby employs the second party and the second party agrees to work for the first party as a teacher in the ..... grade of ..... School assigned to him (her) by the first party or his representative.

2. It is agreed that if the work of the second party is not being performed with professional dignity and diligence and in a manner satisfactory to the first party, then in such event, the first party shall have the right at any time during the period of this agreement to discharge the second party upon the payment to him (her) of ..... month(s) salary and upon such discharge and payment, the first party shall be released from all further obligations or liabilities hereunder.

3. The first party shall pay to the second party the sum of ..... dollars per year in ..... payments on a semi-monthly basis at the rate of ..... dollars per payment on the first and fifteenth day of each month, beginning on the ..... day of ....., 19...., and ending on the ..... day of ....., 19..... In the event [64] that a legal holiday should fall on the first or the fifteenth day of a month, the pay-

ment date shall be one day later, viz., the second or the sixteenth day of that month.

The terms of this agreement shall begin on the ..... day of ....., 19...., and terminate on the ..... day of ....., 19.....

In witness, the parties have here set their hands and seals on the ..... day of ....., 19.....

..... Pastor

..... Teacher

* * * * * * * * * *

Plaintiffs' Exhibit No. 15

[Deposition of Sister Mary Virginia Kelly, Teacher at St. Thomas' School, Providence, Rhode Island]

* * * * * * * * * *

[1] SISTER MARY VIRGINIA KELLY,

first having been duly sworn, testified as follows:

Examination by Mr. Shine

Q. 1. What is your full name, please? A. Sister Mary Virginia Kelly.

Q. 2. And in what order are you a sister? A. Religious Sisters of Mercy.

Q. 3. Are you presently a teacher in a Roman Catholic parish school? A. Yes, sir, Saint Thomas School, Edendale Road, Providence.

Q. 4. Is that school affiliated with a Catholic parish? A. Yes, Saint Thomas parish.

Q. 5. Is the school an elementary school? A. Yes.

Q. 6. What grades? A. Grades one to eight.

Q. 7. And where is the school run, is it run in a separate school building or in the same building as the parish church? A. No, it is a separate school building. I was going to say it is a new building comparatively.

Q. 8. Is the building on the parish property itself? A. Yes.

[2] Q. 9. And it is connected in any way physically with the parish building? A. No.

Q. 10. Does the name of the school appear outside of the building? A. Yes.

Q. 11. And it is the same name as the parish, I take it? A. Yes.

Q. 12. Is there a cross or a crucifix on the outside of the school building? A. Yes.

Q. 13. In the school building are there any crosses or crucifixes throughout the building? A. There is a crucifix in each classroom.

Q. 14. Are there any statues of a religious nature? A. Yes, one statue in each classroom.

Q. 15. A religious statue? A. Of the Blessed Mother, yes.

Q. 16. Are there any pictures or paintings of a religious nature throughout the building? A. Only in the classroom where religion is taught, not in any other room.

Q. 17. What subjects do you teach? A. Mathematics, science, music and art.

[3] Q. 18. Now, in your classroom there is a crucifix and a statue; is that right? A. Yes.

Q. 19. Are there any other religious symbols in your classroom? A. No.

Q. 20. How many students do you teach? A. I teach about, well, there are about 35 and 38 in the sixth grade and the eighth grade, but the fourth and seventh are both 40.

Q. 21. Now, do you have a home room, so-called? A. Yes, the seventh grade is my home room.

Q. 22. How many students are in that home room class? A. Forty.

Q. 23. What time does school start in the morning? A. 8:30.

Q. 24. Are there opening exercises in school? A. The children say prayers led by one of the three or four of the children who are trained to lead the class in prayer.

Q. 25. That is at the beginning of the day? A. Yes.

Q. 26. Are these formal Catholic prayers? A. Yes.

Q. 27. This is done in the room, in your home room; is that [4] right? A. Yes.

Q. 28. You are present? A. Many times I am not because while they are saying prayers there are various other things that I do. Sometimes I am there. This morning I was, but sometimes I am not.

Q. 29. If you have no other pressing duties ordinarily you are there? A. Yes.

Q. 30. You say the children lead the prayers? A. Yes.

Q. 31. Have they always led the prayers at the beginning of class? A. Well, it depends upon the teachers. Some teachers allow it and some teachers lead the prayers themselves. I think it depends upon the individual.

Q. 32. How long have you been doing it this way? A. Well, only this year because I have only been teaching in Saint Thomas this year.

Q. 33. Where did you teach prior to that? A. For the past four years I was administrator at Pine Harbor School in Pascoag for retarded children.

Q. 34. Is that a Catholic school also? [5] A. No, it is a non-sectarian. It is for severely and profoundly retarded children.

Q. 35. Who runs that school? A. We purchased the school from Miss Marjorie Gilmore six years ago.

Q. 36. You say "we?" A. The community.

Q. 37. It is a town that runs that? A. No, the Religious Sisters of Mercy.

Q. 38. They own the school and run the school? A. Yes.

Q. 39. Are there prayers said at any other time of day for the home room class other than at the opening of school? A. Just the opening class and the closing of class at half past 2:00 in the afternoon.

Q. 40. Who leads those? A. Also the children.

Q. 41. That is done in similar fashion as to the opening in the morning.? A. Yes.

Q. 42. Is that also a spoken form of Catholic prayer? A. Yes.

Q. 43. During the course of the day, do the children from your [6] home room stay in that room or do they leave from time to time? A. No, they move from that room into the sixth and into the eighth grade at various times.

Q. 44. For what purpose do they move to other rooms? A. The teacher in the eighth grade teaches English, religion, just English and religion, and the sixth grade teacher teaches social studies, spelling and phys-ed.

Q. 45. Now, the religion that you refer to, is that formal Catholic religion that is taught? A. Yes.

Q. 46. Is that taught in your classroom? A. No, the eighth grade teacher teaches my class religion in her own room.

Q. 47. They leave your room to go to her? A. They leave me at quarter of 10:00 in the morning.

Q. 48. Does another class come in? A. The sixth grade comes in for math and science.

Q. 49. During the course of the year are there any religious programs or services at the parish that the school participates in? A. Well, the children are permitted to go to 8 o'clock Mass that is taking place in the church, if they wish to. It [7] is not compulsory on—on their own initiative.

Q. 50. Do they do that every morning? A. Well, the Mass is there every morning.

Q. 51. That is voluntary? A. Yes.

Q. 52. Are all of the children expected to say the prayers in the morning and in the afternoon at the end of school? A. In the classroom?

Mr. Shine: Yes.

The Witness: Well, I mean, they say prayers, but not every child, it depends upon the child himself.

Q. 53. Are there services that are held at the parish itself from time to time during the school year that the student body and faculty go to? A. We have assemblies in the auditorium which is also a cafeteria, but that is the only thing that the children attend.

Q. 54. Where is that located, in the parish building? A. Right in the same school building.

Q. 55. And not in the parish building? A. No.

Q. 56. Are there masses of one sort or another that from time to time the students attend? [8]A. No.

Q. 57. In the parish? A. Not in the school building. The only Mass they attend, if they wish, is the 8 o'clock Mass.

Q. 58. Are you familiar wih the Catholic Teachers Institute? A. Yes.

Q. 59. Have you attended that in the past? A. Yes.

Q. 60. Are all teachers in the Catholic parochial schools expected to attend that institute? A. Well, it is advocated, not all attend all the time.

Q. 61. Some do not attend as advocated; is that right? A. Well, there are some that don't on occasions when something else comes up more important. I myself would not attend for the past few years. This has only been for one day. Formerly, they were held at LaSalle Academy.

Q. 62. Generally speaking, do all of the teachers attend those? A. Yes.

Q. 63. Does that include sisters as well as lay teachers? A. Yes.

Q. 64. As far as you know, does that include sisters and lay teachers who teach so-called secular subjects entirely? A. Yes.

[9] Q. 65. What sort of program takes place or took place at, say, the last session? A. They had a speaker. I don't know who it was. I can't remember offhand. They usually discuss the role of the Catholic school in the community and subjects such as that.

Q. 66. Any other areas or matters that are discussed or considered at these meetings that you can recall? A. I

can't recall too many. Many times there is a speaker on literature of some particular subject that the schools are working at that year. I know when science came in that many of the talks were given on science.

Q. 67. This year, for example, in your classroom have any students asked to be excused from participating in the prayer at the beginning or end of the day? A. No.

Q. 68. Do you know of any such request from other teachers in your school? A. Not to my knowledge, no.

Q. 69. You spoke a moment ago about the role of the Catholic school in the community and you said that was discussed at the Teachers Institute. What would you say as a teacher, do you have any opinion as to the role that the [10] teacher in a parochial school plays in the community? A. Well, the role according to the religious thinking of the Catholic today is that as young adults going into the community they should hold a Catholic attitude toward different things they meet with and yet it is not totally Catholic. It is a Christian attitude. As teachers we by our example particularly and our handling of the children try to inculcate in them the same Christian attitude.

Q. 70. Do you feel that by way of your example and the way the sisters handle the school and run the school that there is a tone or atmosphere that exists in the parish schools that serves the purpose that you have just mentioned? A. Well, of course, as religious we are toned to discipline and we try to exert discipline with the children so they will be open to studying and to the proper attitude toward their work.

Q. 71. Is there a religious atmosphere that permeates the school by way of setting an example? A. Just the teachers themselves. I don't think there is an overall religious atmosphere.

Q. 72. In your school, I do not recall as you mentioned, how many students are there, do you know, approximately? [11] A. There are about 40 children in each classroom so

there are eight classrooms. That would be 320 children. I don't know the total enrollment.

Q. 73. Do you know if there are any non-Catholic students in the school? A. Not to my knowledge. I don't know all the children because I am new in the school so I couldn't say.

Q. 74. How many teachers are there? A. Eight.

Q. 75. How many of them are sisters? A. Six.

Q. 76. And how many lay teachers? A. Two women.

Q. 77. They are not sisters? A. No.

Q. 78. You testified before that you were a member of a teaching order; is that right? A. Yes.

Q. 79. Do you have any contract of employment with the parish school? A. I signed a contract with the school, yes.

Q. 80. And who signed that contract as the employer? A. Father Dunn, the pastor.

[12] Q. 81. He is the pastor of the parish? A. Yes.

Q. 82. How long a period of time does that contract run for? A. I signed it for two years.

Q. 83. It is a two-year contract and you are paid on a yearly basis? A. Yes, 10 months, a 10-month basis, $7,000.

Q. 84. $7,000 per year and that is paid over 10 months; is that right? A. Yes.

Q. 85. You have applied for Salary Supplement Aid; is that right? A. Yes.

Q. 86. Have you been told by the State authorities whether or not you have been approved for that? A. Well, the only recognition of it I have is that it was in the paper that my name was mentioned.

Q. 87. As having been approved? A. Yes.

Q. 88. Now, if Salary Supplement Aid were to be given to you, do you know how that payment would be handled in connection with your contract with the parish? A. The check would come to me and it would come in two sections [13] so I imagine it would be that Father would make up the residue toward the $700 when I receive the check. In

other words, if I received $500, then he would give me $200 during whichever month that came.

Q. 89. In other words, is it your understanding that any payment you would receive under the Salary Supplement Bill would be taken in effect by the parish as a credit on the salary they owe you? A. Yes.

Q. 90. Now, do you think the continuance or the continued operation of the Catholic parochial schools is important? A. Well, I do and I don't. There are factors for it and factors against it. Mostly, I think we as religious educators have a place in the world and in the community and our prime work is education so that I feel that if we are able to educate young people I think we have the right and duty to continue in Catholic schools.

Q. 91. Would you like to see the parochial schools continue to carry out their functions as they presently do? A. Yes.

Q. 92. Why? A. Well, I feel as a teacher myself and as a religious that is my work and I feel I wish to continue doing that work.

[14] Q. 93. What functions do you feel that it serves to continue to do this work in a parochial school? A. Well we don't differ from the public schools in any way, except that we are religious teachers. In the school they get the same education they receive in the public school and many parents, Catholic parents, would like to have their children in parochial schools and would like to keep the parochial schools in existence, mainly because of the religious training that is given during the religion period.

Q. 94. So that you would say one of the principal functions of the parochial schools is to have available the formal religious training for the students in conjunction with their other education? A. Yes, to teach the religion formally because otherwise we would not reach the children except in C.C.D. class and then you do not get them at the early age you do when you handle them right from the first grade.

Q. 95. What was that C.C.D. you just used? A. Those are the catechetical classes held for public school children after school certain days of the week.

Q. 96. From the standpoint of teaching religion to the children, is it more desirable to have them go to public school [15] than have these classes after school or more desirable to have them attend the parochial schools where they are available? A. Well, of course, that is a big question that is right up before religious communities right now. There are many of us that feel that the children do not like to come to one school right after they have been to another school and so many times there are many children that you lose, whereas if they have it during their school schedule then you are able to reach them better. I was going to say it might work out eventually, but there has not been too much study done on it and practice of it as yet.

Q. 97. From your personal experience, do you feel that this is sufficient reason to want to continue the parochial schools with the format they presently operate under? A. Yes, sir.

Q. 98. That is to say, that it would make it more convenient to continue the religious education of these children? A. Well, I think it is more effective that way.

Q. 99. In terms of having them present physically and available? A. For their religious lesson, for their lesson in religion.

Q. 100. It would be less desirable, I take it you feel from your experience, if they were in public schools and had the [16] obligation to come after school? A. Yes, because many times many of the children, for instance, you have preparation for a sacrament and they do not come. They miss their religious lesson and as a result they are not fully prepared for the sacrament.

Q. 101. In addition to the purpose of making it more convenient to teach formal religion, is there a benefit that the schools perform, in your opinion, with respect to the

religious atmosphere and the close association, for example, with the religious institutions that are of benefit? A. No, I don't feel so. I mean, when we are teaching other subjects, for instance, they are exclusive from religious exercise and religion so it is just for the fact the children are getting their religious education as a formal subject in Catholic schools.

Q. 102. Are most all of the students in the school members of the parish? A. No, we have children from two or three parishes. Some children come from Johnston and some children come from lower down on Manton Avenue.

Q. 103. Would you say that more than half of the children are from the parish? A. Yes.

[17] Q. 104. Is it part of the approach of the parochial schools to encourage and further activity and participation by students and their families and parish activities? A. Well, they have the C.Y.O. for the older children. The younger children do not have too many activities. They tend more to go into the Girl Scouts and Boy Scouts.

Mr. Shine: I have no further questions.

Examination by Mr. Collins

Q. 105. Sister, could you explain to us the circumstances under which you left the job you had last year and you are in the job you are in this year? A. Well, my mother is quite feeble. She is 78 years old. It was a question of putting her in a nursing home or at the Medical Center and so I asked permission of the Community to live with her and take care of her and support her. I was given permission and I was approached by the principal of Saint Thomas School and so I accepted the position with her.

Q. 106. The money that you receive, do you give any of that to the Order? A. No.

Q. 107. Is that used on the expenses for you and your mother? A. Yes.

[18] Q. 108. And I take it you do live with your mother? A. Yes.

Q. 109. Where do you live? A. Jane-Mor Apartments. It is 4 Second Street, North Providence.

Q. 110. Did you ever think at all about teaching in the public schools? A. Yes, I had permission to teach in the public schools in secular clothing.

Q. 111. Were you given an offer by a public school? A. Yes, Providence called me.

Q. 112. Was this before or after you had taken this job? A. After I had accepted this.

Q. 113. What courses do you teach? A. Math, science, art and music.

Q. 114. Do you inject any religion into any of those courses? A. No, because there is no occasion to. They are all secular subjects.

Examination by Mr. Shine

Q. 115. If you had an offer to teach one of the subjects you teach in the public schools and an otherwise similar offer to teach such a course in the parochial schools, Sister, which would you prefer to teach in?

[19] A. Well, I would prefer as a religious teacher among religious, but I would not hesitate to teach in the public school.

Q. 116. You would be prepared to teach in public schools, but you would prefer to teach in the parochial schools? A. Well, as a religious it depends upon what the offer was.

Mr. Shine: That's all.

Mr. Allen: I have no questions.

Mr. Collins: No questions.

Plaintiffs' Exhibit No. 16

[Deposition of William L. Bergeron Teacher, at St. Joseph's School, Providence, Rhode Island]

* * * * * * * * * * *

[1] WILLIAM LEWIS BERGERON, first having been duly sworn, testified as follows:

Examination by Mr. Shine

Q. 1. What is your full name? A. William Lewis Bergeron.

Q. 2. Where do you live? A. 83 Newton Street, Pawtucket.

Q. 3. Where do you work? A. Saint Joseph's School in Pawtucket, Walcott Street.

Q. 4. Is that a Roman Catholic parish school? A. Yes, it is.

Q. 5. Which parish is it connected with? A. Saint Joseph's parish.

Q. 6. What do you teach there, sir? A. I teach science, French and reading.

Q. 7. For what grade? A. Seventh and eighth.

Q. 8. Have you applied for Salary Supplement Aid? A. Yes, I did.

Q. 9. Have you been notified as to whether or not you have been approved? A. No, I haven't.

Q. 10. How long have you been teaching at the school, sir? [2] A. I started in this school in September.

Q. 11. You taught previously in the parochial schools? A. I taught the second semester at Mercy Mount Country Day School, Cumberland.

Q. 12. Anything prior to that? A. I did some substitute teaching during the 67-68 school year.

Q. 13. When you were substituting, where did you substitute? A. In the public schools of Pawtucket.

Q. 14. And last year during the second semester when you taught, what subjects did you teach? A. I taught mathematics and reading.

Q. 15. Now, how many students, if you know, approxi-

mately, are in the school you presently teach at? A. Approximately 200, somewhat over that.

Q. 16. How many people on the faculty? A. There are four lay teachers and five nuns.

Q. 17. Who is the principal? A. Sister Mary Rose.

Q. 18. Who is the pastor in that church? A. Monsignor Beane.

Q. 19. Do you have a contract for teaching there this year? A. Yes, I do.

[3] Q. 20. Do you have a written contract? A. Yes.

Q. 21. What is your salary for the year? A. $6,000.

Q. 22. How is that paid to you? A. In bi-weekly installments continuing through the year.

Q. 23. Twelve months a year? A. Just during the school year, the 10 months.

Q. 24. Every two weeks you get paid? A. Yes.

Q. 25. Are those payments calculated on the $6,000 figure? A. Yes, they are.

Q. 26. Do you have an understanding with the parish—

Mr. Shine: Strike that.

Q. 27. Who is the employer under your contract? A. Monsignor Beane is the one I made the contract with, the pastor.

Q. 28. Is there any understanding that you have with him in the event that you are paid any Salary Supplement Aid by the State? A. What would happen, most likely, is that he would simply discontinue paying us when the Supplement is [4] given and resume again when the Supplement comes out so that the pay stays continuous.

Q. 29. What time does school start at your school? A. It starts at 8 o'clock.

Q. 30. Do you have a home room session? A. Yes, I do.

Q. 31. How many students? A. Twenty-six.

Q. 32. Do you know if they are all Catholics? A. Yes, they are.

Q. 33. What is the program in terms of starting of the school day, are there opening exercises, for example? A. There is a prayer at 8 o'clock at the bell and a home room period.

Q. 34. How long does that last? A. Fifteen minutes, then the classes are divided. It is departmentalized.

Q. 35. Are there other lay teachers in your school who have applied for Salary Aid, do you know? A. There are two more.

Q. 36. What do they teach, do you know? A. Mrs. Trainor teaches mathematics and Mrs. Lesperanz.

[5] Q. 37. And what does the second teacher teach? A. She teaches English primarily. We all teach reading.

Q. 138. Do they both have home room sessions? A. Yes, they do.

Q. 139. Getting back to the beginning of the day, what time does instruction actually begin, what time does the formal instruction begin? A. At 8:15.

Q. 140. Who supervises the prayer the first thing in the morning? A. I have one of my home room students lead the prayers.

Q. 141. Under your supervision? A. I say the prayers with them.

Q. 142. But you are present? A. I am present, yes.

Q. 143. What does the student do, come to the head of the class? A. No, they stay at their places.

Q. 144. Is that done every day? A. Yes.

Q. 145. Do the same students do that every day? A. Different students every day.

[6] Q. 146. Is it a little bit of an honor to give to the students? A. Well, not really.

Q. 147. Why do you have the students lead the prayer? A. Well, as I understood the terms of the Supplement, we were to refrain from teaching religion and using it during school time so that I wasn't sure as to whether this would come under it so I just had them say the prayers. They know them. They have been saying them for years.

Q. 148. How long have you been following this practice? A. Since September, since the first day.

Q. 149. What prayer is said, is it the same prayer or different prayers? A. Usually the morning offering and an Our Father.

Q. 150. Are these formal Catholic prayers? A. More or less formal, yes.

Q. 151. All of the students rise; is that right? A. Yes.

Q. 152. And you call on a student to lead the prayer? A. Just to remind them it is their turn.

Q. 153. But everyone in the classroom says the prayer in unison? [7] A. Yes.

Q. 154. You say it with them? A. Yes.

Q. 155. Do you have a desk? A. Yes.

Q. 156. Do you stand up behind the desk? A. I usually stand one side of the room.

Q. 157. Are the prayers said at any other time of the day in your school, in your classroom? A. Not in my classroom, no.

Q. 158. In other classrooms? A. Yes.

Q. 159. And what time of the day are they said, do you know? A. Before and after the lunch period and at the close of the school day.

Q. 160. These prayers are not said in your classroom? A. No.

Q. 161. Do you know if they are said in the classroom where these other two lay teachers that you referred to teach? A. I don't know.

Q. 162. Do you know if the other lay teachers you have referred to who have applied for Salary Aid, do you [8] know if they have opening exercises similar to the way you have them? A. I imagine they do.

Q. 163. Do you know one way or the other from personal knowledge? A. No, not from personal knowledge.

Q. 164. Now, is there a formal religion class taught during the course of the day at some time or other during the week? A. Yes.

Q. 165. And when is that religion taught? A. It is taught for a half an hour in the afternoon to the Junior High people.

Q. 166. Taught to your students? A. Yes.

Q. 167. Who teaches that? A. Sisiter Viola, the seventh grade teacher.

Q. 168. She is another teacher at the same level as you are at the seventh grade? A. Yes.

Q. 169. Where is her room? A. It is across the hall from mine.

Q. 170. She comes across the hall and teaches the religion [9] course? A. No, the students change classes throughout the day.

Q. 171. Do they change for every class? A. Yes, as your schedule goes they do it. Occasionally the schedule fixes it where students will be in the same room consecutively.

Q. 172. In the home rooms or any of the common areas of the school, are there any crucifixes displayed? A. In the rooms.

Q. 173. In every room? A. As far as I know.

Q. 174. In your classroom? A. Yes.

Q. 175. Are there any statues of a religious nature throughout the building? A. Yes, there are statues.

Q. 176. Where are they located, sir? A. Usually the statues are on like a piano or separate table one side of the room.

Q. 177. In the classroom? A. In the classroom.

Q. 178. In your classroom also? A. No, there are no statues in my classroom.

[10] Q. 179. Just the crucifix? A. The crucifix.

Q. 180. Any other religious symbols or pictures in your classroom? A. There are two paintings.

Q. 181. What sort of paintings, sir? A. One is of the Last Supper and the other is a Passion scene.

Q. 182. And are there similar paintings throughout the building? A. Yes.

Q. 183. In the other classrooms, too? A. Yes.

Q. 184. In the classroom where these other two lay teachers you have referred to teach? A. I believe so.

Q. 185. Now, for the courses that you teach the students come into your room; is that right? A. Yes.

Q. 186. Do you teach any courses to your home room? A. Yes, I teach science. I have some for French and a supervised study.

Q. 187. And students rotate and your students in your home [11] at some point leave and other students come in? A. Yes.

Q. 188. And in this room you teach them the subjects you are referring to; is that right? A. Yes.

Q. 189. At any time during the school year does the school student body and the faculty participate in any activities at the parish church? A. At the beginning of the year there was a Mass.

Q. 190. What would be the purpose for that? A. It is what we call Mass of the Holy Spirit. It is a prayer for guidance.

Q. 191. Is that in conjunction with the opening of the school year? A. Yes, it is normally followed.

Q. 192. Now, Mr. Bergeron, as far as you know is that customary at the beginning of each school year to have that Mass? A. It is customary.

Q. 193. At the church? A. Yes.

Q. 194. Does the entire school go over to participate? A. Yes.

Q. 195. Is your school in a separate building from the parish [12] church itself? A. Yes, it is in a separate building..

Q. 196. Is it adjacent to the church? A. Across the street.

Q. 197. Is it on the church property as far as you know? A. Yes.

Q. 198. And the name of the parish is on the outside of the building; is that right? A. Yes.

Q. 199. And is the name of the parish outside on the building? A. Yes.

Q. 200. Is there a crucifix or cross on the outside of the building? A. There is a statue.

Q. 201. Is that a religious statue? A. A religious statue of Saint Joseph.

Q. 202. And that Mass you referred to, do all of the students go with all of the teachers? A. Yes.

Q. 203. The nuns as well as the lay teachers? A. Yes.

Q. 204. Are there other occasions during the year when there is participation by the school at other services [13] or activities in the parish? A. There may be, depending on the liturgical season.

Q. 205. Have there been any other since you have been there since September? A. Not that I recall, no.

Q. 206. Do they have Mass, for example, on First Friday? A. They have the First Friday, but it is not in conjunction with the school. It is not in conjunction with the school exercises.

Q. 207. You can't recall any other occasions where the school has gone over? A. No.

Q. 208. Any other holidays or religious holidays that have been celebrated by the student body in the school? A. Well, celebrated, what do you mean by "celebrated?"

Mr. Shine: Well, participation in which the school participates or takes an active part.

The Witness: Not in a liturgical way, not for Mass or a ceremony.

Q. 209. Do they participate in the school itself in some fashion in a program of some sort?

Mr. Collins: Well, I object.

Mr. Shine: Let's back track a minute.

[14] Q. 210. You refer to the First Mass, the Mass in the fall when the school season began; is that right? A. Yes.

Q. 211. Then I asked you if there were any other occasions where the students and the faculty took part in any sort of services in the parish other than that? A. There are no parish services—well, there have not been since September for the school children in particular—well, depending if a major saint's day comes up, like Saint Patrick, or something, then some of the children in the classes will make posters or reports usually in the religion class.

Q. 212. Are there any other occasions where the parish has religious services in which the students participate? A. Well, not students of the school. Some belong to other organizations outside of the school.

Q. 213. Are there any occasions when, for example,

classes are suspended for a short time to allow students to participate in services? A. There have not been this year.

Q. 214. Were there at the parish where you worked last year any such services?

Mr. Collins: I object to that. That is irrelevant.

[15] Mr. Shine: You can answer the question.

The Witness: No, not during school time.

Q. 215. Before school or after school? A. After school they had First Friday services.

Q. 216. All of the students would go to the church for services? A. If they wished.

Q. 217. Is any religion other than Roman Catholicism taught in a formal fashion in your school? A. Not that I know of.

Q. 218. Who hired you, sir? A. I was hired after an interview with the principal by the pastor.

Q. 219. To whom did you originally apply? A. To the principal.

Q. 220. Did you have any dealings with the Catholic School Board? A. Dealings?

Q. 221. Did you apply to them in any fashion? A. Not for this job.

Q. 22. For other jobs? A. In finding out what work was available, I sent an application in to them to find out what schools required teachers.

Q. 223. You went to them originally for information as to a position and they told you about the availability of this position [16] presently? A. Not for this position, no. I heard from a friend who was teaching there.

Q. 224. Originally, did you go to them for the purpose of finding out what positions were available; is that right? A. Yes.

Q. 225. Have you ever known any teachers in the parochial schools who are divorced? A. No.

Q. 226. Have you known any teachers in the parochial schools who have been ex-communicated Catholics? A. No.

Q. 227. Is there a Catholic Teachers Institute, so-called, that is held for teachers such as yourself? A. Yes, there is.

Q. 228. Did you attend that last year? A. Yes, I did.

Q. 229. Have they held it this year? A. It was held the last calendar year, this school year, that's the one I attended.

Q. 230. In 1969, the fall, is that what you are referring to? A. Yes.

Q. 231. Where was that held? [17] A. At Mount Saint Charles.

Q. 232. And who attended that, if you know? A. The teachers from—I think it was Northern Rhode Island area, from the Catholic schools.

Q. 233. Were these nuns as well as lay teachers? A. Yes.

Q. 234. Including some lay teachers who taught only secular subjects, so-called? A. Oh, yes.

Q. 235. Do you know if the other teachers that you referred to as having applied for Salary Aid from your school attended? A. Yes.

Q. 236. How long a program is that, sir? A. It is a day-long program and it went on just one day this year.

Q. 237. Who runs the program, so to speak? A. The Diocesan School Board, I believe.

Q. 238. Father Mullen? A. Father Mullen was one of the principal speakers.

Q. 239. And are materials handed out, written materials, to teachers participating at the session? A. Yes, there were.

Q. 240. Of what nature, just generally describe it? [18] A. I believe there was a statement on the condition of the schools, how many teachers were available and how many pupils there were.

Q. 241. Did you receive any material on the Salary Supplement Law? A. I don't believe there was anything written down on it.

Q. 242. Was there any discussion of it. A. Honestly, I can't recall any formal discussion of it.

Q. 243. Are all of the faculty members in your school required to attend that institute? A. Yes.

Q. 244. Do you have a college degree, sir? A. Yes.

Q. 245. From where? A. From Providence College.

Q. 246. Do you personally as a teacher feel that the Catholic parochial schools perform an important function? A. A what function?

Mr. Shine: An important function.

The Witness: Yes.

Q. 247. Will you describe, in your own words, what that would be? A. The parochial school provides an opportunity for the children to receive religious instruction besides their normal secular instruction that is required for their [19] everyday living and puts them in closer contact with other Catholic children for sort of mutual development.

Q. 248. Does it put them in closer contact with the Catholic clergy than it would otherwise have if they did not attend the parochial school? A. As is stands now, yes.

Q. 249. Does it keep them in closer touch with their parish activities than they might otherwise be if they were to attend public schools? A. Yes. Normally, an announcement from the parish comes about activities and the children in school will hear it whereas they can't be sure that everyone who gets the parish bulletin reads it.

Q. 250. Without trying to be repetitive, what would you say would be the purpose as far as you understand it and the way you try to operate of the parochial schools? A. In the way I try to operate?

Mr. Shine: Yes.

The Witness: Well, in the way I operate it is simply a job of teaching science, French and reading. The principal advantages of the school are taken over by the nuns who teach the period of religion or who may get children together for various projects.

[20] Q. 251. Do you think the functions of the parochial school could be carried out as effectively if the children obtained this education in these courses you teach in the public schools and did not attend the parochial schools? A. You mean would they get as much secular education?

Q. 252. Do you think that the purposes of the school would be as effectively carried out if these children were obtaining their secular education in the public schools?

Mr. Collins: Objection.

Mr. Allen: Objection.

Mr. Shine: Would you answer the question if you understand it, please?

The Witness: I am afraid I don't quite understand.

Mr. Collins: Do you mean if they attended the public schools would they still have as much training or exercise of their religion, do you mean that?

Mr. Shine: That is what I mean.

The Witness: That is what you mean?

Mr. Shine: Yes.

The Witness: Okay, so I don't believe myself that many of the children would get the religious education attending a public school separately and then [21] having to go someplace else for their own religious training. I think it is a matter of convenience mainly.

Q. 253. It makes it easier for the religion to be taught because the students are already in the parochial school; is that what you are saying? A. Yes.

Mr. Shine: That is all.

Examination by Mr. Collins

Q. 254. Do you inject religion into the courses you teach? A. No, I don't inject it, no.

Q. 255. Do you teach them any differently than you taught when you were teaching in public schools? A. No.

Q. 256. What was your salary last year? A. It was based on $5400 a year.

Mr. Collins: I have nothing further.

Examination by Mr. Shine

Q. 257. Do you know what Salary Supplement you would be eligible for this year if it is paid to you? A. I believe it would be $900, which is 15 per cent of the $6000.

Mr. Shine: That is all. Do you have anything?

[22] Mr. Allen: I am reflecting.

Mr. Shine: Excuse me.

Mr. Allen: No, I have no questions.

Plaintiffs' Exhibit No. 17

[Deposition of Rev. Christian E. Guilbeault, Pastor of St. Matthew's Church, Central Falls, Rhode Island]

* * * * * * * * * * *

[1] REVEREND CHRISTIAN E. GUILBEAULT,

first having been duly sworn, testified as follows:

Examination by Mr. Shine

Q.1. What is your full name, sir? A. Reverend Christian E. Guilbeault, G-U-I-L-B-E-A-U-L-T.

Q.2. Where do you reside, sir? A. 1030 Dexter Street, Central Falls.

Q.3. And are you a priest of the Catholic Church? A. I am pastor of Saint Matthew's Church.

Q.4. Where is that located? A. In Central Falls.

Q.5. How long have you been a pastor, sir? A. In Central Falls since 1965.

Q.6. And before that? A. I was pastor of Saint Agatha's for five years, Saint Agatha's in Woonsocket.

Q.7. Now, does Saint Matthew's have a parish elementary school? A. Yes.

Q.8. And what is the name of the school, sir? A. Saint Matthew's School.

Q.9. Where is the school carried on, where is this school conducted? [2] A. On the parish property, if that's what you mean.

Q.10. Is it a separate building from the church building itself? A. Yes.

Q.11. Is it connected to the church building? A. No, not at all.

Q.12. But it is on the parish land; is that right? A. Yes.

Q.13. Would you tell us approximately how many students are in the parish school? A. About 496.

Q.14. And is there a principal there? A. There is.

Q.15. Who is the principal? A. Sister Simonne Daigneault, a Sister of Saint Ann.

Q.16. How many people are on the faculty? A. Counting everyone, 18. By "faculty," I suppose you mean the librarian is included and the superior or do you mean just the teachers?

Mr. Shine: Everyone you would consider as being on the faculty of the school.

The Witness: Eighteen.

Q.17. Are any of those faculty members laymen? [3] A. Four of them.

Q.18. And the other 14 are— A. Religious sisters.

Q.19. They are nuns, are they? A. Yes.

Q.20. Now, who selects the principal of the school? A. Right now it is selected by the Provincial, the Provincial in Marlboro. I don't remember her name. She was appointed just a couple of months back.

Q.21. What is the Provincial? A. The Provincial is the head of the order in a certain region. In all of New England she would be the head of the order. She appoints the sisters to different schools. She appoints the principal.

Q.22. Does that order engage and appoint all of the sisters for teaching in your school? A. Yes.

Q.23. And who engages the lay teachers? A. The pastor.

Q.24. And do they come directly to you with respect to a job or are they referred to you? A. Both ways. When you are looking for a lay teacher [4] you try to find one personally alone or you get help from the school board or friends.

Q.25. What school board are you referring to? A. The Catholic School Board of the Diocese of Providence.

Q.26. Does the Catholic School Board have to approve all lay teachers you wish to hire? A. They are supposed to. There are guidelines we have to follow.

Q.27. But they are supposed to approve lay teachers; is that right? A. Yes.

Q.28. Now, how are the operations of the school financed? A. Mainly through subsidy from the parish. There is a

nominal fee for the pupils and the deficit is made up by the parish.

Q.29. The parish has its own independent income; is that right? A. Yes.

Q.30. And how does it handle the financing of the school, does it provide an allocation each year for the running of the school or are the school finances considered part and parcel of the finances of the parish? [5] A. Right now the second explanation is the right one.

Q.31. Which is that? A. That we have the school going on as an activity of the parish and, therefore, if they can't meet their obligation, and we know they will not, the parish is responsible.

Q.32. As a practical matter, for example, when bills come in for supplies or books or materials, do they come into the parish or to the school? A. Well, the parish will give the school every month a certain amount and there is a treasurer at the school who pays from the checkbook made out to Saint Matthew's School, so the bills may come to one or the other. They come to the school or to the parish.

Q.33. But substantially all of the bills are paid out of parish funds; is that right? A. Yes.

Q.34. Now, do any of the nuns have contracts of employment? A. Not now.

Q.35. Did they ever? [6] A. No, but there was talk of it for the future It is an understanding and it always has been an understanding between the Provincial and the parish that nuns are sent there. It is for the year, if not more.

Q.36. Do the lay teachers have contracts? A. Yes.

Q.37. And is it a form contract that is recommended to each parish or do you enter— A. Yes, well, it is a form contract. It is a form we have that we fill out.

Q.38. Are the contracts essentially the same terms, except varying, for example, with respect to salary, are they the same terms? A. Yes. I don't know what other terms you are implying. The contract is a financial affair.

Q.39. For example, do they all run for the same term? A. Yes, for a year.

Mr. Shine: For a year.

Q.40. And I assume the salaries vary from individual to individual; is that right? A. Yes.

Q.41. Who determines what salary will be paid to a lay [7] teacher? A. Right now the pastor is doing it in accord with the person asking for a position.

Q.42. Are there any guidelines from the Catholic School Board on that? A. Yes.

Q. 43. What type of guidelines? A. There is a minimum that is suggested for those who have degrees and then there is supposed to be an addition every year to that salary, to that minimum.

Q.44. In other words, is it fair to say these are recommended scales? A. Yes.

Q.45. By the Catholic School Board? A. Yes, that's right.

Q.46. Are those the salaries that you engage lay teachers on? A. This year, yes.

Q.47. Are there any lay teachers in your school who have, to your knowledge, applied for and been accepted for the Salary Supplement Aid?

Mr. Collins: If he knows.

Mr. Shine: I said, "To your knowledge."

[8] The Witness: I think there is only one who is certified and I couldn't say whether he has applied.

Q.48. Would that be Mr. Crane? A. Yes.

Q.49. What is Mr. Crane's first name? A. Maurice.

Q.50. Now, did certain material come to your attention from the Rhode Island Department of Education with respect to information they requested in connection with the Salary Aid Program, did you fill out any questionnaires or any materials in connection with the program? A. I don't recall.

Q.51. Do you know if anybody else at the parish did? A. I don't think they would have done it without my knowledge.

Q.52. Were there, for example, requests for financial information as to the operations of the school that came to your attention? A. No.

Q.53. Do you know if anyone at the school filled out any such questionnaires? [9] A. I don't recall. As I say, they would have mentioned it to me. I'd be the superior and they would have mentioned it to me and I don't recall.

Q.54. On your contracts with lay teachers, how are the salaries paid, are they all generally paid on the same basis throughout the year? A. Some are paid on a 12 month, 52-week basis, and others on the 10-month basis.

Q.55. Is that an option of the teacher? A. Yes, we leave it to them.

Q.56. Now, are the payments made for the salary on a monthly basis? A. Well, two of them on a monthly basis and two of them bi-monthly or twice a month.

Q.57. And the bi-monthly or monthly payments, as the case may be, are those calculated on the basis of the gross salary that the contracts provide for? A. Yes.

Q.58. Now, with respect to Mr. Crane, for the moment assume that Mr. Crane has been qualified because in a previous deposition at the Department of Education [10] they listed him as being qualified under the Salary Supplement Aid, has he been getting his salary based upon the gross figure in his contract? A. Yes.

Q.59. If a Salary Aid payment were to be made to him, who would get that? A. He would get it, but it is understood—it would mean that the salary that is paid by the parish would be that less.

Q.60. In other words, some the payments, monthly or bi-monthly payments to him after the receipt of the Salary Supplement, would not be made to the extent— A. Some of the burden would be taken off our shoulders.

Q.61. Off of the parish's shoulders? A. Yes.

Q.62. His contract is with the parish, I take it; is that right? A. Yes, but when these contracts are signed they are done in a triplicate form and he gets one and we keep one and the Board of Education gets one.

Q.63. Who signs on behalf of the employer, is it the principal? A. The pastor.

[11] Q.64. It is the pastor? A. Yes.

Q.65. Does anyone from the School Department, in addition, sign or approve these contracts? A. Not up to now.

Q.66. Do you have any reason to believe that that is going to change? A. It seems to me I read some suggestion that contracts might be signed at the office—the Central Falls office.

Q.67. Would that be the Superintendent of Diocesan Schools office? A. Yes.

Q.68. So that has not been the practice? A. No.

Q.69. But you understand it might be? A. I heard or I read something.

Q.70. Is it fair to say that if the Supplement payments were made that the financial responsibility of the parish would be lessened by the extent of any salary? A. Most fair.

Q.71. That is an accurate statement? A. Oh, absolutely.

[12] Q.72. And that would presumably make equal amount of money available for other parish activities; is that correct?

Mr. Collins: I object to that. That is an argument. I do not think that he is qualified to answer that. He has testified that he has a contract with the teacher.

Q.73. Well, let us take the case of—supposing Mr. Crane did receive, let's say, $500 salary Supplement, that would be that much less that the parish would have to pay him; is that correct? A. It would be that much less that the parish would pay him, but it would mean that we have that much more money to invest in the school.

Q.74. And for other parish activities? A. No.

Mr. Collins: I object.

Q.75. Wouldn't that money also be available for other parish activities?

Mr. Collins: He just answered that. He said that he would have that much more to invest in the school.

Mr. Shine: I heard his answer. I am [13] asking him a further question. I think I am entitled to an answer.

Q.76. Now, I understand your answer, sir, and my question is: would that not also mean that the parish by having to pay $500 less would have that amount of money for other parish activities, whether it be the school or whether it be any other aspect of the parish activities, wouldn't it be up to you to decide as to where the money would be spent?

Mr. Collins: I object to that. He said he would have that much more to put in the school. That is the answer he has given you.

Mr. Shine: I would ask that the question that I have just asked be answered. This gentleman need not be protected to the extent that answers have to be told to him.

Mr. Collins: I object to that, Mr. Shine. He has given you an answer. I repeated that answer to you. If you don't like the answer, I don't think that you have to go back and back at this man to get an answer that you might like.

Mr. Shine: I am asking the question to which there has been no answer.

[14] The Witness: Do you want me to answer?

Mr. Collins: I can't tell you not to answer. You go ahead, if you can.

The Witness: What is the question again?

(Whereupon pending question was read by the reporter)

The Witness: I would repeat what I said a little while ago. We want to better the school and, therefore, if we had an extra amount of money we certainly would put it in the school.

Q.77. Would it not be your decision to decide where such parish funds would be spent for parish purposes? A. Yes.

Q.78. That would be your decision? A. Of course.

Q.And, as you say now, you would like to put such funds into the school, but that would be something you would have to decide at the particular time; is that correct?

Mr. Collins: I object to that. That is not a fair restatement of the testimony and, moreover, you are not cross-examining this man. You called [15] him as a witness and so I object to the form of the question.

Q.80. Wouldn't the choice of where such monies that would be saved be spent, wouldn't that be up to you, sir? A. The spending of money in a parish is up to the pastor in general.

Q.81. So you could use them for school purposes or for non-school purposes, depending on your choice at the time; is that correct?

Mr. Collins: I object to that. I think you are trying to lead this witness down a path and I do not think it is appropriate. He has testified if he had the extra money he would put it to the school. You keep trying to say that maybe he would spend it some other place.

Q.82. Is it possible for you to spend it some other place? A. Is it possible?

Mr. Shine: That is all I am asking.

The Witness: I have to say it is possible.

Q.83. If there were a pressing need at the moment in the parish, other than in the school, is it not possible such funds would be used for that pressing need?

[16] Mr. Allen: Objection. Speculative.

Mr. Collins: I object. It is leading.

Q.84. Is that not possible, sir?

Mr. Collins: Objection. The man testified and he tried to tell you what he does or would do. We are not concerned with possibilities and I do not think he is.

Mr. Shine: Would you answer the question, sir?

The Witness: Repeat that question.

(Whereupon pending question was read by the reporter)

Mr. Allen: My objection is not waived.

Mr. Shine: Would you answer the question, sir? The gentlemen have made objections on the record to protect their interest and I would ask that you answer the question, sir.

Mr. Collins: Also to protect yours because we do not want you to have the benefit of an answer if your question is proper.

The Witness: You are asking is it [17] possible.

Q.85. What I am saying is: is there any certainty that funds that would be saved by the parish as a result of this Salary Supplement Bill, is there any certainty that those funds would definitely go into the school?

Mr. Collins: I object to the form of the question.

Mr. Shine: You may answer. Is there any such certainty?

The Witness: Any such certainty? I think I told you awhile ago, and I would repeat, that whatever we save would permit us to better the conditions in the school which it would certainly would go back to the school. We have a certain budget to run the parish. We have a certain budget to run the school. Now, if our budget to run the school, instead of being spent fully on salaries, gave us a certain amount, $500 or more, certainly that would go into the school because there is always betterment possible in a school building.

Q.86. The decision as to where such savings would go in the parish would at any time be up to the pastor; [18] is that correct?

Mr. Allen: Objection. You may answer. It is repetitive. However, you may answer.

Mr. Shine: Is that correct?

Mr. Collins: He has already answered the question. He said, "Yes."

Q.87. Is that your answer, sir? A. Yes, the spending of money is up to the pastor.

Q.88. What sort of expenses does the parish have other than the school operations?

Mr. Allen: I object. It is a fishing expedition.

Mr. Shine: This is a discovery procedure, Mr. Allen.

Mr. Allen: I thought we were intending to use this—if

that is your characterization of it, I withdraw my objection.

The Witness: What is the question again?

(Whereupon pending question was read by the reporter)

The Witness: Well, the running of a parish, the maintenance of a parish, the repairs of [19] parish buildings.

Q.89. Maintenance of the church building, for example? A. The church, the rectory, the convent.

Q.90. Do you from time to time go into the parish school during the course of the school year? A. Yes.

Q.91. Is this done on a regular basis or irregular basis? A. As far as I am concerned, an irregular basis because there is a curate appointed who is guidance counsellor in the school and, therefore, he has nearly daily contact with the school.

Q.92. There is a curate appointed, you say? A. Yes.

Q.93. Who appoints the curate? A. The pastor.

Q.94. And you have a curate in the school, your school; is that right? A. Yes.

Q.95. Is the curate a lay person? A. A priest.

Mr. Shine: A priest.

Q.96. Is he a priest of the parish? A. Yes.

[20] Q.97. And is he an assistant or someone under your control? A. He is the assistant, yes. The curate is assistant to the pastor.

Q.98. He is the assistant pastor? A. Yes.

Q.99. Does he have responsibilities with respect to the parish school? A. None other than—well, as I say, he is more or less of a guidance counsellor. He will teach religion classes.

Q.100. Is he in the school on a regular basis? A. Regular.

Q.101. For classes for example? A. Yes, I would say regular.

Q.102. And how often do you go into the school? A. It is not on a regular basis so I can't say. I might go a couple of times a month.

Q.103. Now, in recent years has your parish school had problems in providing competitive salaries for lay teachers

for the school? A. Has it had problems? I would have to answer yes.

Q.104. And the problems are in terms of insufficient funds [21] in the parish to pay such lay teachers? A. Yes.

Q.105. And would this problem not be alleviated as a result of the Salary Supplement payments that would be made? A. Certainly.

Q.106. Now, are all of the students in the parish school children of parents of the parish? A. No.

Q.107. How many of them are not, sir, do you know? A. Maybe 25 or 30 are from outside the parish.

Q.108. Are they all Catholics also? A. No.

Q.109. How many non-Catholics in this school, sir? A. I couldn't tell you. It is not a great number of non-Catholics. Maybe—

Mr. Collins: If you do not know, Father, don't guess.

Q.110. Less than 25, is it? A. Yes.

Q.111. How many students do you have in your school? A. Four hundred ninety-five-ninety-six.

Q.112. Is there a preference given to admitting parish [22] students into the parish school if space is short? A. Certainly.

Q.113. And is there a preference given within a parish if a space is short to children of wealthier parishioners? A. No.

Q.114. Is there any guideline from the Diocese along these lines? A. I couldn't say if there is any guideline from the Diocese. It has always been the practice, I think, in every parochial school not to use as a basis for admission the wealth or poverty of a person if he needs it and if we can take him in we do.

Q.115. Are you familiar with the Diocesan Handbook for Schools, sir? A. I have read it sometime ago.

Q.116. Do you know if there is any regulation or policy in that handbook which controls the parish schools along the lines of giving preference to wealthier parishioners? A. I do not, no, but I do not think there would be anything like that.

Q.117. If space is limited, is there a preference given to non-parish Catholics as opposed to non-Catholics?

Mr. Collins: By that, do you mean [23] non-Catholics in the geographical boundaries of the parish?

Mr. Shine: Let me ask the question again.

Q.118. You said before that with respect to parish and non-parish students, parish students get a preference; is that right, if there is a shortage of space; is that right? A. Yes.

Q.119. And if there are limitations of space, who gets the preference, sir, Catholics who are outside of the parish or non-Catholics? A. In that case I think it would be first come, first served, the first one to apply.

Q.120. Now, are you familiar generally with the conduct of the parish school, the operations of the parish school? A. In general, yes.

Q.121. You are generally familiar with the courses that are taught in the parish school? A. In general, yes.

Q.122. Is a teacher allowed to teach anything that is contrary to Catholic religious doctrine in the parish [24] school?

Mr. Collins: Wait a minute. I object to that. I don't know what you mean by that.

Mr. Shine: You do not understand the question, sir?

Mr. Collins: Well, I think I am entitled to understand it also, Mr. Shine. I object to it as being not understandable. By that do you mean the religion courses or mathematics course?

Mr. Shine: Any course.

The Witness: Could you give an example? I can't in an elementary school think of anything.

Q.123. Well, would a teacher in the parish school be allowed to teach in any subject at any time of the day any matter that is contrary to the Catholic religious doctrine?

Mr. Collins: I register the same objection. Father asked you if you would help him by giving him an example.

The Witness: In a grammar school they are teaching history and they are teaching science, they are teaching

mathematics and they are [25] teaching languages and literature. I don't see what could a teacher want to teach in a elementary school that would be contrary to Catholic teaching.

Q.124. Suppose they wanted to teach something you were against? A. Murder?

Q.125. Did you say "murder?" A. Yes.

Q.126. That would be against Catholic doctrine; is that right?

Mr. Collins: What course, Mr. Shine, in a grammar school would be attempting or entitled to teach that murder is good or bad?

Mr. Shine: I am asking you, Father, if there were any such instructions in the school, would that be allowed?

Mr. Allen: I register an objection.

Mr. Shine: You can answer the question.

The Witness: I would have to say no.

Q.127. Is there any religion taught in the parish school [26] other than Catholic religion in a formal fashion?

Mr. Allen: Could I have that question read?

(Whereupon pending question was read by the reporter)

Mr. Collins: I will stipulate Mr. Shine, that in his parochial school and any others that instruction in the religion course is Roman Catholic.

Mr. Shine: And will you stipulate that no other religion is allowed to be taught?

Mr. Collins: In the instruction?

Mr. Shine: In the parish schools?

Mr. Collins: How do you mean "allowed to be taught?" Do you mean by instruction?

Mr. Shine: In any manner whatsoever.

Mr. Collins: I can't stipulate to that.

The Witness: I think I can answer part of that question.

Mr. Shine: Go ahead, sir.

The Witness: The period dedicated to religion, of course, during that period it is the [27] Catholic religion that is

taught, but in history courses, for example, most certainly the youngsters are taught about other religions, if that is what you mean.

Q.128. There is no other formal religion taught other than Catholic? A. No.

Q.129. And would a teacher be allowed to teach in a formal manner any religion other than Catholic? A. No.

Q.130. Now, will the parish engage any teachers who have remarried after a civil divorce?

Mr. Allen: I object to it on the ground of relevance and pertinence.

The Witness: Certainly we'd look for other teachers, to begin with.

Q.131. And why would you look for other teachers? A. Because the teacher is supposed to be a witness to his beliefs and we expect the teacher to be a Catholic teacher or at least to live up to certain norms, certain ideals and the one you describe would not be our idea of a teacher.

Q.132. Would those same standards apply to lay teachers, [28] that is what we are talking about? A. Well, right now they apply only to lay teachers.

Q.133. Would they apply to lay teachers who teach math, do they also apply to lay teachers who would teach courses such as math and science and music?

Mr. Collins: Are you talking with reference to this man's preference?

Mr. Shine: I am only talking about you, sir, your situation and what you know.

The Witness: I certainly would try to find a teacher with the personal credentials.

Q.134. Even with respect to a teacher of so-called secular subjects? A. Yes.

Q.135. Now, are the reasons you would take that position based upon policies of the Diocesan schools?

Mr. Collins: I object to that. I do not think this man would know that.

Mr. Shine: If you know.

The Witness: My personal opinion?

Mr. Shine: Based upon your position as a priest, sir.

The Witness: Yes.

[29] Q.136. And your Catholic training? A. Yes.

Q.137. And your religious beliefs? A. My convictions.

Q.138. Would an ex-communicated Catholic be allowed to teach in the school?

Mr. Collins: In his particular school?

The Witness: No.

Mr. Shine: I am sorry but I did not hear your answer.

The Witness: No.

Q.139. Do you think they would be allowed to teach in any other parochial schools as far as you know?

Mr. Collins: I object to that, Mr. Shine, as to what he might think. We are not interested as to what his speculations are with respect to other schools and you just said you only wanted to know what he knows.

Mr. Shine: If you know, do you know?

The Witness: As far as I know, the same answer.

[30] Q.140. They would not be allowed to? A. No.

Q.141. Have you been connected with other parish schools other than the present one? A. No other parish school, no.

Q.142. You have been in other parishes; is that right? A. Yes, I was in another parish, but there we were starting out our building from zero, so we had the church.

Q.143. What is Synodal law? A. Synodal law, law according to the Synod. That means the Synod of the Diocese of Providence.

Q.144. Of what is that made up, what constitutes it? A. The Synod?

Mr. Shine: Yes.

The Witness: The Synod is a grouping of all of the priests of the Diocese called for by the Bishop to go over the general law of the church and apply it to a particular region.

Q.145. Who enunciates the Synodal law? A. The Bishop.

Q.146. Of what effect does that have on the operations, for example, of a parish and a parish school? [31] A. These are the guidelines that we should follow.

Q.147. So they have a binding effect upon the pastor and the church and the parish and the parish school?

Mr. Collins: When you say "binding," what do you mean by binding?

Mr. Shine: I am asking the Father. I am asking him what it means.

Mr. Collins: I know, but "binding" is a word that has a theological meaning and it has a philosophical meaning or it may mean just what a particular person thinks.

Mr. Shine: I would like to ask the Father what do you feel the effect is.

The Witness: In the Synod we are given guidelines. At times we will be told that this is strictly observed and that means there is a strict obligation there and so there is a definite level, you might say, in the guidelines.

Mr. Shine: Had you finished your answer?

The Witness: Yes.

Q.148. Who is the chief executive officer, so to speak, if we could use that phrase, in the parish; is that the [32] pastor? A. The pastor.

Q.149. And, as such, are you fully responsible for and do you have control over the parish school operation? A. Officially, yes, although you, according to what they call the principle of sub-superiority, if you have a superior appointed to the school you let her take care of school matters.

Q.150. Do representatives of the Diocese attend the school from time to time and visit the school? A. Yes, there are representatives who come.

Q.151. Are these priests, sir? A. The last one was a sister, I think.

Q.152. Either priests or sisters? A. Yes.

Q.153. Do they make formal periodic visits through the school? A. Yes.

Q.154. Do they sit in on any of the classes? A. I think so.

Q.155. Do they sit in on all of the classes to observe them? A. I couldn't say if they go to all of the classrooms. [33] I know they go to some of them.

Q.156. Do you know if they only go to the religion class or do they go to others? A. Everything, the entire curriculum.

Q.157. They make sample observations, do they? A. The complete curriculum of the school is examined.

Q.158. That includes the so-called secular subjects such as math and music? A. Oh, yes.

Q.159. And they observe those classes, too, in their official capacity? A. Yes.

Q.160. Do you confer from time to time with the principal of the school? A. Yes.

Q.161. With regard to the operations of the school? A. Yes.

Q.162. Do you consider that the lay teachers in the school are an integral of the Catholic educational structure in that school?

Mr. Allen: I object. I mean, I do not understand what the thrust of this question is. They are on the same payroll and apparently [34] they are in the same building. What is the thrust of the question? I think the question needs a good deal more precision.

Mr. Shine: Do you understand the question, sir?

The Witness: Yes.

Mr. Shine: Could you answer it?

The Witness: Certainly.

Q.163. The answer is "certainly?" A. Yes.

Q.164. Does that include lay teachers who teach so-called secular subjects as well as other lay teachers? A. Yes.

Q.165. Why is that so?

Mr. Collins: Why is what so? I will stipulate they are all part of the school system.

The Witness: They are considered as an integral part.

Q.166. Of the Catholic Educational Structure, is that what you said? A. To make them feel at home and to bring out the full cooperation so that they are not considered as [35] outsiders. They are members of the faculty.

Q.167. I would ask you this, sir: during the school year,

sir, are operations of the school from time to time stopped for the students to attend Mass in the church? A. Are they stopped?

Q.168. Well, I say, sir, are classes adjourned for purposes of students to attend Mass? A. Usually when we have it we try to integrate it in the program so it will be either at the end of the morning or at the beginning so as it will not interfere with the classes.

Q.169. All of the students go to church for Mass? A. Once in awhile, yes.

Q.170. And an adjustment is made in the program for the day to accommodate the students going to the church for Mass; is that fair?

Mr. Collins: No, I do not think it is fair.

Mr. Shine: I am asking you—

Mr. Collins: Wait a minute, Mr. Shine. You served us with 12 notices for depositions. We tried to work things out and we tried to [36] accommodate you and we tried to make arrangements for this man to be here and now you are engaging in a cross-examination of this man. He said that they tried to accommodate and tried to put the Mass at the beginning of the day or the end of the day so as not to disrupt classes. Now you are saying you want him to say the reverse.

Q.171. You said that sometimes the children go to Mass at the end of the morning session; is that right? A. Yes.

Q.172. Instead of remaining in the school; is that right, where they ordinarily would be? A. The way it is done is that the last period of the morning would be curtailed and this would be part of their religious education for the day.

Q.173. Are all of the students required to attend such a program? A. Well, everyone is invited.

Q.174. Do all, in fact, attend?

Mr. Collins: He would like to think so.

The Witness: Most of them.

Q.175. Do all of the teachers attend? [37] A. Yes, they are glad to do so.

Q.176. All of the lay teachers attend? A. I have never checked on them. I have seen some of them at least.

Q.177. Do you expect that all of the lay teachers will attend? A. No. You can expect them. It is free. It is up to them if they want to come.

Q.178. What happens if a sister or a member of the clergy in the parish passes away, is the school program affected? A. No, it is not, just to try to find another one, that's all.

Q.179. Is the school closed, for example, out of respect? A. On the day of the funeral, of course.

Q.180. The school itself is closed? A. Well, if it is the priest in the parish everything is closed in the city. If it is a sister, well, probably the funeral might take place at the Mother House in Worcester, but we would have some religious Mass, for example, probably on Saturday, to make sure that more people are free to come.

Q.181. But, if it is the pastor, for example, the school would [38] be closed for the funeral; is that correct? A. That is one of his privileges.

Q.182. In such an unfortunate situation, is the school student body and the faculty expected to attend the funeral as a body out of respect?

Mr. Allen: Note my objection.

The Witness: Not as a body.

Q.183. Is there a mission program that is taught in the school? A. A mission program?

Mr. Shine: Yes.

The Witness: What do you mean by "mission program?"

Q.184. Well, is there such a thing as a mission program?

Mr. Collins: He has asked you what you mean.

Q.185. Is there any such thing as a mission program that you know of? A. What do you mean by "mission?"

Q.186. You don't know what a mission program is? A. I could explain it in a few ways, I suppose, but is there a mission program in the school? Do you mean a missionary

program by which the youngsters [39] are made aware of a missionary and what the meaning of the word "missionary" is at home and abroad; is that what you mean?

Mr. Shine: Yes.

The Witness: In that sense, there is a missionary movement program which means much more. There is a missionary spirit.

Q.187. How many times are Catholic prayers said in a formal fashion during the course of the day in the parish school?

Mr. Collins: If he knows.

The Witness: If it is the way I did, it would be the beginning and the end.

Q.188. What courses does Mr. Crane teach, do you know? A. I know he has a course in sociology.

Q.189. Does he have a home room, so-called? A. No, it is departmentalized. I think he teaches sociology to different groups.

Q.190. Does each teacher on your faculty have a home room, so-called, that he works out of? A. No.

Q.191. Are there such things as home rooms? A. A few in the lower grades, I think.

[40] Q.192. Do your students come in the morning and go to one particular classroom? A. In the lower grades.

Q.193. And the others do not? A. Well, from what I know, from the fourth grade up a number of subjects are departmentalized.

Q.194. Does every student stay all day through the day in his home room? A. No.

Q.195. Some of them move around? A. Yes, some subjects are taught to a group, two or three classrooms at the same time. This would be, therefore, down in the school hall.

Q.196. Mr. Crane has no responsibility for taking care of a separate class of students? A. He must start the day in a certain classroom, I suppose.

Mr. Shine: That is what I am asking.

Q.197. And does he supervise the saying of prayers in that classroom? A. If he is there at the beginning of the day he would.

Q.198. Well, if he does have that classroom, is that his [41] responsibility? A. Well, I suppose, as I say, I don't know if he has a particular classroom.

Q.199. Who would know? A. The superior.

Q.200. By "superior," you mean the principal of the school? A. The principal of the school, yes.

Mr. Shine: I have no further questions.

Mr. Collins: No questions.

Mr. Allen: I have no questions.

Examination by Mr. Collins

Q.201. Last year, Father, what did you pay the lay Teachers? A. Do you mean the 68-69 or 69-70 year?

Mr. Collins: 68-69.

The Witness: About $23,000.

Q.202. Well, are you paying the lay teachers more this year than you did last year? A. Yes.

Mr. Collins: That's all I have.

Examination by Mr. Shine

Q.203. You say you are paying more for lay teachers this year than last year? [42] A. There was a slight rise in their salaries.

Q.204. Is that rise in the salaries equal to the Salary Supplement that they would obtain? A. No.

Q.205. Is it more or less? A. Less.

Mr. Shine: All right.

Plaintiffs' Exhibit No. 18

[Contract of Sister Mary Virginia Kelly with St. Thomas' School]

ST. THOMAS PARISH

TEACHER CONTRACT

I, Sister M. Virginia Kelly, R.S.M. No. & Street .... City or Town Providence do hereby accept an appointment as a Probationary Teacher in St. Thomas School, for the period of two years provided I meet all the requirements of the Catholic School System.

Date: 6/17/69

/s/ Sister M. Virginia Kelly, R.S.M.
Signature of Applicant

I, Louis W. Dunn, the pastor or administrator of said parish do hereby agree to employ Sister M. Virginia Kelly, RSM, of Providence as a teacher in St. Thomas, City or Town Name of School for the academic year 1969-1970, at the salary of $7,000 a year

Date: June 18, 1969

/s/ Louis W. Dunn
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island —02903)

Plaintiffs' Exhibit No. 19

[Contract of Appellant Ralph F. McElroy with Ss. John and Paul School]

SS JOHN & PAUL PARISH

TEACHER CONTRACT

I, Ralph F. McElroy No. & Street William F. Angell Lane City or Town N. Scituate, R. I. do hereby accept an appointment as a Probationary Teacher in SS John & Paul School, for the period of Sept. 1969—June 1970 provided I meet all the requirements of the Catholic School System.

Date: Sept. 2, 1969

/s/ Ralph F. McElroy, Jr.
Signature of Applicant

I, John V. Doyle, the pastor or administrator of said parish do hereby agree to employ Ralph F. McElroy, of William F. Angell Lane N. Scituate, R. I. as a teacher
City or Town
in SS John & Paul, for the academic year 1969-1970, at
Name of School
the salary of $6400.00

Date: Sept. 2, 1969

/s/ John V. Doyle
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island—02903)

Plaintiffs' Exhibit No. 20

[Contract of William L. Bergeron with St. Joseph's School]

ST. JOSEPH PARISH

TEACHER CONTRACT

I, William L. Bergeron No. & Street 17 Phoenix St. City or Town Central Falls, R. I. 02863 do hereby accept an appointment as a Probationary Teacher in St. Joseph School, for the period of Sept. '69-June '70 provided I meet all the requirements of the Catholic School System.

Date: Sept. 2, 1969

/s/ William L. Bergeron
Signature of Applicant

I, Wm. J. Beane, the pastor or administrator of said parish do hereby agree to employ William L. Bergeron, of Central Falls, R. I. as a teacher in St. Joseph, for
City or Town Name of School
the academic year 1969-1970, at the salary of $5,100.00

Date: Sept. 1, 1969

/s/ William J. Beane
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island —02903)

Plaintiffs' Exhibit No. 21

[Contract of Appellant William A. Hanson with Msgr. Matthew F. Clarke School]

MSGR. MATTHEW F. CLARKE PARISH

TEACHER CONTRACT

I, William A. Hanson No. & Street 113 North River Drive City or Town Narragansett, R. I. do hereby accept an appointment as a Probationary Teacher in Msgr. Clarke School, for the period of 1969-1970 provided I meet all the requirements of the Catholic School System.

Date: May 30, 1969

/s/ William A. Hanson
Signature of Applicant

I, Rev. James J. Cassidy, the pastor or administrator of said parish do hereby agree to employ William A. Hanson, of 113 North River Drive Narragansett, R. I. as a City or Town teacher in Msgr. Clarke, for the academic year 1969-Name of School 1970, at the salary of $6000.00

Date: May 30, 1969

/s/ James J. Cassidy
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island –02903)

Plaintiffs' Exhibit No. 22

[Contract of Appellant Alan E. Moss
with St. Brendan's School]

ST. BRENDAN PARISH

TEACHER CONTRACT

I, Alan Moss No. & Street 78 Congress Street City or Town Fall River do hereby accept an appointment zip as a Probationary Teacher in St. Brendan School, for the period of one year provided I meet all the requirements of the Catholic School System.

Date: May 1969

/s/ Alan E. Moss
Signature of Applicant

I, Msgr. Kenny, the pastor or administrator of said parish do hereby agree to employ Alan Moss, of 78 Congress Street Fall River as a teacher in St. Brendan, for the City or Town Name of School academic year 1969-1970, at the salary of $6000.00 ($5100.00 payable by Msgr. Kenny; $900.00 supplement paid by the State semi-annually)

Date: May 1969

/s/ John J. Kenny
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island —02903)

Plaintiffs' Exhibit No. 23

[Contract of Appellant Phyllis A. Walter
Blessed Sacrament School]

BLESSED SACRAMENT PARISH

TEACHER CONTRACT

Made in Providence, Rhode Island on the third day of September, 1969 between Msgr. McKitchen pastor of Blessed Sacrament Church (hereinafter called the first party) and Phyllis A. Walter residing at 58 Chapman Street, Providence, R. I. (hereafter called the second Party.)

WITNESSETH

1. The first party hereby employs the second party and the second party agrees to work for the first party as a teacher in the Blessed Sacrament School.

2. It is agreed that if the work of the second party is not being performed with professional dignity and diligence and in a manner satisfactory to the first party, then in such event, the first party shall have the right at any time during the period of this agreement to discharge the second party upon the payment to him (her) of one month's salary and upon such discharge and payment, the first party shall be released from all further obligations or liabilities hereunder.

3. It is agreed that the basic salary received will be $6000 per year—of which the first party will pay $5100 and the State of Rhode Island $900

4. The first party shall pay to the second party the sum of $5100 in sixteen payments on a semi-monthly basis at the rate of $300 per payment on the first and fifteenth day of each month, beginning on the 3rd day of September, 1969 and ending on the 19th day of June, 1970. In

addition, the first party will make two other payments to the second party, one in February and one in June of $150 each.

In the event that a legal holiday should fall on the first or fifteenth day of a month, the payment date shall be one day later, viz., the second or the sixteenth day of that month.

The terms of this agreement shall begin on the 3rd day of September, 1969 and terminate on the 19th day of June, 1970.

In witness, the parties have here set their hands and seals on the 3rd day of September, 1969.

/s/ Wm. D. McKitchen
Pastor

/s/ Phyllis A. Walter
Teacher

Plaintiffs' Exhibit No. 24

[Contract of Appellant Madelyn C. Law with St. Timothy's School]

ST. TIMOTHY PARISH

TEACHER CONTRACT

I, Madelyn C. Law No. & Street 45 Shenandoah Road City or Town Warwick zip do hereby accept an appointment as a Probationary Teacher in St. Timothy School, for the period of one year provided I meet all the requirements of the Catholic School System.

Date: June 18, 1969

/s/ Madelyn C. Law
Signature of Applicant

I, Patrick J. Hunt, the pastor or administrator of said parish do hereby agree to employ Madelyn C. Law, of 45 Shenandoah Road Warwick as a teacher in City or Town St. Timothy, for the academic year Sept. 1969-June, 1970, at the salary of $6000.00
Name of School

Date: June 18, 1969

/s/ Patrick J. Hunt
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island –02903)

Plaintiffs' Exhibit No. 25

[Contract of Appellant Frank J. Shealey with St. Sebastian's School]

ST. SEBASTIAN — PROVIDENCE PARISH

TEACHER CONTRACT

I, Frank J. Shealey No. & Street 10 Elton Road—Box 306 City or Town West Yarmouth, Mass. 02673 do hereby accept an appointment as a Probationary Teacher in St. Sebastian School, for the period of Sept. 1969—June 1970 provided I meet all the requirements of the Catholic School System.

Date: 7-11-69

/s/ Frank J. Shealey
Signature of Applicant

I, T. Henry Barry, the pastor or administrator of said parish do hereby agree to employ Frank J. Shealey, of 10 Elton St - West Yarmouth as a teacher in City or Town St. Sebastian, for the academic year 1969-70, at the Name of School salary of $6000.00

Date: July 11, 1969

/s/ T. Henry Barry
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island —02903)

Plaintiffs' Exhibit No. 26

[Contract of Appellant John Earley
with St. Francis Xavier's School]

ST. FRANCIS XAVIER PARISH

TEACHER CONTRACT

I, John Earley No. & Street 5 Cumberland Road City or Town Riverside, Rhode Island zip do hereby accept an appointment as a Principal in St. Francis Xavier School, for the period of Sept. 1, 1969—Aug. 31, 1970 provided I meet all the requirements of the Catholic School System.

Date: 9/12/69

/s/ John R. Earley
Signature of Applicant

I, Rev. Manuel de Rego, the pastor of said parish do hereby agree to employ John Earley, of Cumberland Road Riverside, Rhode Island as a teacher in
City or Town
St. Francis Xavier, for the academic year September 1,
Name of School
1969 - Aug. 31, 1970, at a salary of 1200.00 State aid
6800.00 Church
$8000.00 Total

Date: 9/12/69

/s/ Rev. Manuel de Rego
Signature

(This agreement is binding between the appointee and the school indicated above. It should be completed in *triplicate;* one copy for the teacher, one copy for the parish records, and one copy to be forwarded to the Diocesan School Office, Cathedral Square, Providence, Rhode Island —02903)

Intervenor-Defendants' Exhibit A

[Curriculum of Roman Catholic Elementary Schools]

Grades	1	2	3	4	5	6	7	8
Religion	150	150	150	150	150	150	150	150
*Science				140	140	140	225	225
*Social Studies				140	140	140	225	225
*Foreign Language	100	100	120	140	140	140	150	150
Arithmetic	125	125	200	200	200	200	225	225
Language Arts:								
Reading	700	650	525	300	300	300	300	300
Handwriting, Spelling, English	200	280	285	280	280	280	225	225
Art and Music	120	150	150	150	150	150	150	150
Physical Education	100	100	100	100	100	100	100	100

In grades 4, 5, and 6

* These subjects may be taught 4 (four) days per week.

Supreme Court of the United States

Nos. 569 & 570, *October Term, 19* 70

John R. Earley et al.,

Appellants,

v.

Joan DiCenso et al.; and

William P. Robinson, Jr.,
Commissioner of Education of
State of Rhode Island, et al.,

Appellants,

v.

Joan DiCenso et al.

APPEALS from the United States District Court for the District of Rhode Island.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one and one half hours is allotted for oral argument. The cases are set for oral argument immediately following Nos. 89 and 153.

November 9, 1970

FILE COPY

FILED
FEB 16 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. ~~1199~~ 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

HENRY W. SAWYER, III,
1100 PNB Building,
Philadelphia, Pa. 19107
Attorney for Appellants.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC., *Plaintiffs-Appellants,*

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA, *Defendants-Appellees,*

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT.

Appellants appeal from the final Order entered on November 28, 1969 by a District Court panel of three judges of the Eastern District of Pennsylvania dismissing the appellants' Complaint seeking a preliminary and final injunction against the Treasurer and the Superintendent of Public Instruction of Pennsylvania enjoining them from disbursing any public funds pursuant to Act 109 of the Laws of Pennsylvania, known as the Pennsylvania Nonpublic Elementary and Secondary Education Act. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW.

The majority and dissenting opinion of the three-judge District Court for the Eastern District of Pennsylvania is not yet reported.

Copies of the Opinions and the Order of the majority of said court dismissing the Complaint are attached hereto as an Appendix (1 app - 43 app, *infra*).

JURISDICTION.

This suit, to enjoin the enforcement of a Pennsylvania statute as unconstitutional, was brought under 28 U.S.C. § 1343 and § 2281, and was heard by a three-judge court pursuant to 28 U.S.C. § 2284. The final decree of the three-judge court was entered on November 28, 1969; notice of appeal was filed in the District Court on December 17, 1969.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. § 1253. The jurisdiction of the Supreme Court to review the judgment on direct appeal is sustained by the decision in *Briggs v. Elliott*, 342 U.S. 350 (1952), and is in conformity with the procedure in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

STATUTES INVOLVED.

The statute of Pennsylvania, the constitutionality of which was challenged before the three-judge court, is Appendix A to the majority opinion (24 app - 31 app, *infra*).

It provides that all of the proceeds from a certain tax on horse racing up to $10 million, and one-half of all proceeds in excess of $10 million, shall, under the direction of the Superintendent of Public Instruction be used for reimbursement to nonpublic schools for the purchase of "secular" educational services. "Secular" services are defined as consisting of courses in mathematics, modern foreign languages, physical science and physical education, and the reimbursement is limited to the actual cost to a nonpublic school of the teachers' salaries, textbooks and instructional material used in the teaching of courses in those four categories. The Act requires that the textbooks and instructions materials be approved by the Superintendent of Public Instruction, that a satisfactory level of pupil performance shall have been attained, and makes provisions respecting teacher certification in nonpublic schools. The application for reimbursement and the payments themselves take place after the close of the year in which the teaching occurs. The Act directs that the payments be made to the school itself and the school accounts are made subject to audit.

QUESTIONS PRESENTED.

The three-judge court, sustaining a motion to dismiss, declared constitutional (Hastie, C. J., dissenting) a statute which provides for direct monetary payments of public funds to sectarian, church-administered schools. The Complaint alleged that the statute violated the religious clause of the First Amendment and the equal protection clause of the Fourteenth Amendment. The majority found that (1) none of the plaintiffs had standing to raise the alleged violation of the equal protection clause, (2) that the individual plaintiffs had standing to raise free exercise questions but the Complaint failed to state a clause of action under this clause, and that (3) as to the one plaintiff with standing to raise the question under the establishment clause, the Act was constitutional on its face and therefore the Complaint failed to state a cause of action thereunder.

The questions presented are these:

1. Do organizational appellants such as these have standing to raise issues under the First and Fourteenth Amendments?

2. Do individual appellants have standing as taxpayers to raise issues under the establishment clause if they have paid state taxes, including school taxes, but not paid the specific tax, the expenditure of the proceeds of which is alleged to violate the First and Fourteenth Amendments?

3. Do the individual appellants have standing as taxpayers, citizens, residents and parents of children in the public schools, to raise the question of violation of the free exercise clause where they allege that, contrary to their religious consciences, they are being forced by operation of the taxing power to contribute to the propagation of religion by the supporting of sectarian schools?

4. Do any of the individual appellants, one of whom is a Negro, whose children attend the public schools, have standing under the equal protection clause, where the Complaint alleges that public funds are being disbursed under the Act to schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion and which are racially segregated either by design, tradition, policy, quota, cost, residential pattern, or religious requirement, and which further alleges that the subsidy from the Commonwealth will tend to perpetuate and promote such racial discrimination?

5. Does a Complaint which alleges that public monies are being paid over directly to sectarian schools owned, controlled and administered by religious bodies under an Act which has as its primary purpose and effect the advancement of religion by the subsidization of sectarian schools state a cause of action under the religious clause of the First Amendment?

6. Does a Complaint which alleges that public funds are being paid directly to schools which are de facto racially segregated and which by purpose or effect discriminate on the grounds of race or religion state a cause of action under the equal protection clause of the Fourteenth Amendment?

7. Does a Complaint which alleges that legislation prefers one religion state a cause of action when, on a motion to dismiss, plaintiffs, offer to prove that over ninety per cent of the recipients of the state funds are organs of a particular church?

8. Does a statute which declares that due to rapid increases in costs in the public schools and the fact that twenty per cent of the school children attend nonpublic schools (97% of which are church schools) that the closing

of a majority of the nonpublic schools would constitute an intolerable financial burden on the state and therefore provides subsidy to these schools constitute a constitutionally forbidden use of religious institutions to achieve a secular purpose and create a forbidden interdependence between church and state?

STATEMENT.

In April of 1968 the Committee on Basic Education of the House of Representatives of the Commonwealth of Pennsylvania held extensive hearings. As stated at the outset by the chairman of that Committee, the purpose of the hearings was "to find out if state funds can be used for aid to nonpublic schools" in view of the fact that "these school systems are in serious financial difficulty."[1] The Committee in a Series of Hearings, of which the official transcript totals 800 pages, proceeded to do just that: it considered (by means of receiving testimony and by staff study) all of the various known or proposed channels and devices by which state aid could be given. The result was Act 109 of the Laws of Pennsylvania, the statute here under attack. The scheme of the Act is that, from funds derived from a tax on flat and harness racing, the Superintendent of Public Instruction of the Commonwealth of Pennsylvania is authorized to cause the Treasurer of the Commonwealth to reimburse nonpublic schools, by cash or draft, for the cost to those schools of teachers' salaries, textbooks and teaching materials in the fields of mathematics, modern foreign languages, physical science, and physical education for the preceding year. The statute itself calls this a "purchase of services" and speaks of contracts to be entered into for such services. In the words of Chief Judge Hastie, dissenting in the court below, "This phrase is not descriptive of the statutory scheme." Chief Judge Hastie's description of the process is succinct:

"A nonpublic school that desires financial aid under the Act need do no more than submit, on a form pre-

1. Official transcript, pp. 3-4, opening statement of Chairman Fox, Committee on Basic Education, House of Representatives Hearing of April 3, 1968.

> scribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called 'contract'. The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure for asking for aid and later proving that it has made expenditures that are reimbursable under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none." (Appendix, 33 app)

Over $5 million is now being paid by the Commonwealth of Pennsylvania in installments, commencing with the first payment in September, 1969, for reimbursement for costs incurred by the nonpublic schools for the preceding academic year, 1968-69. Appellants' Complaint, which requested a three-judge court, sought a preliminary and final injunction restraining the appropriate officials of the Commonwealth from making any payments pursuant to the Act to the seven church-affiliated defendant schools, which were alleged to be typical of virtually all of the schools receiving aid. Of the pupils in nonpublic schools in Pennsylvania, 96.6 attend church-affiliated schools.[2] The Complaint alleged that the statute, on its face and as applied, authorized payment to sectarian educational institutions controlled by churches, having as their purpose the

2. *Statistics on Nonpublic Elementary and Secondary Schools, 1965-1966*, Office of Education, U.S. Dept. of Health, Education and Welfare, OI-20111.

teaching and propagation of a particular religious faith and conducting their operations, curriculums and programs to fulfill that purpose; and further alleged that the overwhelming proportion of the recipient schools discriminated in admissions and employment on the basis of race and religion. With respect to the fact that these schools were the organs and instrumentalities of churches and religious groups, the Complaint alleged that the statute violated both the establishment and the free exercise clauses of the First Amendment and that as to the fact that the Act authorized the payment of funds to schools which discriminate on the basis of race and religion, violated the equal protection clause of the Fourteenth Amendment.

With respect to the violation of the religious clause of the First Amendment, the Complaint made certain specific allegations of fact. The Complaint alleged a violation of the establishment clause in that the Act provides for direct financial aid out of state funds to sectarian schools, that it finances and participates in the blending of sectarian and secular instruction, and that it has as its purpose and primary effect the advancement of religion. The free exercise clause was alleged to be violated by reason of the fact that the statute constitutes taxation for the support of religion.

The allegation of violation of the equal protection clause by reason of alleged racial and religious discrimination was based, in the Complaint, on the fact that the defendant schools and the preponderance of the other schools eligible for aid were *de facto* racially segregated in both admission of pupils and employment of teachers and administrators, such segregation arising "either by religious requirement, design, tradition, policy, quota, cost or residential pattern." The Complaint alleged that tax aid by the Commonwealth would tend to perpetuate and

promote such segregation, with the ultimate result of promoting two school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private, subsidized school system predominantly white, affluent and superior.

The Complaint was filed on June 3, 1969, together with a Motion for Preliminary Injunction and an Order for the appointment of a three-judge court. On July 7, 1969 appellants filed interrogatories and a Motion to Produce under Rule 34 upon defendant schools. All discovery was subsequently stayed pending disposition of several motions by defendants below, including motions to dismiss the Complaint for failure to state a claim and for lack of standing. On November 28, 1969, after briefs and argument, the District Court dismissed the Complaint, Chief Judge Hastie dissenting. Appellants contended that the First Amendment is violated on a number of grounds.

In the first place, it was contended that any such payment from the Treasurer of the Commonwealth to the treasuries of sectarian, church-affiliated schools for their unrestricted use was a violation of the establishment clause, per se, under the rule of *Everson v. Board of Education*, 330 U.S. 1 (1946) forbidding any tax aid "to support any religious activities or institutions."

All parties below and the majority and dissenting judges below agreed that, if the Act were to survive the preceding point that direct tax subsidy was, per se, unconstitutional, the prime test to which the Act must then be submitted was that originally formulated by Chief Justice Warren in *McGowen v. Maryland*, 366 U.S. 420 (1960), and repeated and developed in *Abington School Dist. v. Schempp*, *supra*, and *Bd. of Education v. Allen*, 392 U.S. 236 (1968); namely, whether the primary legislative purpose is secular *and* its primary effect one that neither advances or inhibits religion.

More particularly, it was alleged in the Complaint and contended in briefs and at oral argument that the primary legislative purpose, as revealed by the official legislative history, was to alleviate an alleged financial crisis of the Catholic parochial school system and thus to aid religion. This contention was, in form and in substance, made as an allegation of *fact* which appellants specifically offered to prove, after discovery, at trial. Pages 42 to 53 of appellants' Memorandum Contra Defendants' Motion to Dismiss proffered the factual basis for the Complaint's contention of a legislative purpose designed to aid religion by including therein verbatim excerpts from the hearings, committee reports, and debates on the floor of the House and Senate of Pennsylvania, and proposed that the three-judge court take judicial notice of these official documents of the Legislature of Pennsylvania; or, in the alternative, offered to introduce them into evidence at trial.

As to the Act's primary effect, it was contended the Act on its face advanced religion since the Act, together with the official regulations promulgated by the Superintendent of Public Instruction (of which the Court could take judicial notice) involved a statutory scheme under which it was obvious that there was no actual purchase of services and that the Commonwealth received nothing in return for its money; and, alternatively, it was contended that discovery and trial would prove the foregoing by placing the regulations and the form of applications for the state aid formally in evidence, prove that the recipient schools were rendering no additional services and, in addition, demonstrate the all-pervading religious character and purpose of the approximately 97% of the recipient schools which are church affiliated.

It was further alleged and contended below that by reason of the statistical facts available in official government publications, to wit, that of the 1140 church-related

elementary schools in Pennsylvania, all but 56 were Roman Catholic, and that of the 276 church-related secondary schools in Pennsylvania, all but 27 were Roman Catholic,[3] that the Act preferred one religion over another. Further, that aside from the designed preference for Catholics, the same statistics also demonstrated that very few of the religious sects having a measureable number of members in the Commonwealth of Pennsylvania maintained any parochial school system, and therefore that the Act by effect preferred one or two religions over all others, in violation of the classic summary of the religious clause set in *Everson v. Board of Education, supra.*

The Complaint alleged and appellants contended below that the very justification for Act contained in its own preamble and findings, accepting them at face value, at the very least required the conclusion that the state was using religious means to further secular ends, in violation of *McGowan, supra, Torcaso v. Watkins,* 367 U.S. 488 (1961), and *Abington School Dist. v. Schempp, supra,* and the principle of the least possible power doctrine. The Complaint also alleged and the appellants contended below that the Act on its face and as applied creates a forbidden interdependence and fusion between religious institutions and the state, in violation of the principle of Madison's *Memorial and Remonstrance* and the conclusion of the majority in *Abington School Dist. v. Schempp, supra,* to the effect that the establishment clause prohibits "a concert or dependency of one upon another" (page 222). The specifics and particulars of this interdependence were offered to be put of record by the normal process of discovery and trial.

The majority below did not actually grapple with any of the above contentions nor did they at any time indicate

3. *Statistics on Nonpublic Elementary and Secondary Schools,* 1965-66, Office of Education, Dept. of Health, Education and Welfare, OE-20111, Tables 3a, 3b.

that they felt the need for a record; the opinion simply reviews (and accepts) the preamble and factual and policy findings with which the final text of Act 109 was well-equipped. The court did not "search out the fact and truth . . . to determine if the Constitution has been violated," as required by *Evans v. Abney*, decided January 26, 1970, 38 U.S. Law Week 4115, 4117.

The court, including the dissenting judge, found a lack of standing in all the plaintiffs to raise issues under the fourteenth Amendment. These were essentially that the effect of the Act was to subsidize and perpetuate racial and religious segregation in the schools of Pennsylvania, which it was alleged were *de facto* segregated by design, tradition, policy, quota, cost, residential pattern or religious requirement. The court also decided that the organizational plaintiffs had no standing in the case at all, and that under their application of *Flast v. Cohen*, 392 U.S. 83 (1967), only the plaintiff who had purchased a ticket at the race track had standing to raise issues under the establishment clause.[4] All of the judges agreed that the one plaintiff who had standing under the establishment clause by virtue of his ticket purchase lacked standing to raise the equal protection issue because, although a Negro and a parent of Negro children in the public schools, he did not allege that he attempted to apply on behalf of his children for admission to any of the recipient schools. The court ignored the contention of the plaintiffs below that the Act, by reason of its subsidization and perpetuation of racial (and religious) segregation, had an adverse effect on the *public* schools which their children attended, although the Complaint specifically alleged that the effect of the Act would be to create

4. The majority questioned but accorded standing to the individual plaintiffs under the free exercise clause; the dissenting judge did not. None of the judges discussed plaintiffs' complaints under the free exercise clause.

a dual school system in which the "public" schools would be schools for the poor and the black and the "private" but subsidized schools largely for the affluent whites and certain religious denominations. Thus, the impact alleged by the Complaint was not an Act of discrimination by any particular school in the Commonwealth against the Negro plaintiff's children, but an inevitable, if not immediate, deleterious and racially discriminatory effect upon schools attended by his children.

THE QUESTIONS ARE SUBSTANTIAL.

The Supreme Court should take jurisdiction of this case in order that it may vacate the Order dismissing the Complaint and either (a) remand with a direction to proceed with discovery and trial on both First and Fourteenth Amendment issues or (b) take judicial notice of the official Committee proceedings, transcripts, reports and journals of the House and Senate of Pennsylvania, and the regulations and application forms promulgated by the Superintendent of Public Instruction, and declare the Act unconstitutional on its face as violative of the First Amendment.

Specific significant federal constitutional questions are discussed in outline below.

But prior to reaching those, a broad substantial question is presented by the mixed procedural and substantive implications of the action of the court below in determining what is widely acknowledged to be a significant test case involving a then innovative (and now widely copied) legislative scheme which presented novel and fundamental First and Fourteenth Amendment issues without answer, discovery or trial. Were this pattern to become established, a marked change in the standards required of a complaint in order that a plaintiff may have his day in court would result.

Thus, the first substantial question is procedural and would be a substantial question meriting review and reversal even if this case did not raise constitutional issues of the first magnitude, for the majority of the court below radically departed from the accepted standards promulgated by the Supreme Court as to the circumstances under which a complaint may be dismissed under 12(b)(6) of the Federal Rules. The court's action in dismissing the Complaint violates the rule in *Hart v. B. F. Keith Vaudeville*

Exchange, 262 U.S. 271 (1923), where Mr. Justice Holmes went so far as to state that dismissal could not be justified unless "the claim was wholly frivolous." The principle was more recently repeated in *Radovich v. National Football League*, 352 U.S. 445 (1957).

After granting *pro forma* that well-pleaded facts in a complaint are deemed admitted for the purpose of testing its sufficiency (Maj. Op., 11 app), the majority avoided the factual allegation that the primary legislative purpose was to aid religion by labeling it a conclusion of law. Likewise an allegation even more obviously factual, that the primary *effect* of the legislation was to aid religion, was labelled a conclusion of law although interrogatories already filed (answers to which were stayed) were designed to factually delineate this allegation. The court below ignored other factual allegations susceptible of evidentiary proof and offered to be proved, such as, that the device of purchase of services was a subterfuge, that the state received nothing for its money, and that the Act as applied preferred one religion over another, and others discussed below.

The equal protection argument was not reached by the court below because of a determination that no party had standing to raise the issue.

The First Amendment.

The majority below concluded that the allegation that the primary purpose and primary effect of the Act was to aid religion was a conclusion of law, and as such, not admitted for the purpose of testing the sufficiency of the complaint. Having established that proposition, the court then said:

> "The question of law then presented is whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its

administration is to advance or inhibit religion. (Maj. Op., 11 app-12 app)

This question was answered by the court entirely and solely by reference to the text of the Act itself. The majority determined the legislative purpose by accepting what the legislature itself, in the Act's text, declared its purpose to be: "To promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; . . ." Other facts, declared to be facts by the legislation under attack, were accepted by the majority, e.g., the burden on the public treasury if private institutions were to cease to "bear their present educational burdens." Specifically, the majority declined to examine the legislative history because "the legislative findings of the state are not to be lightly set aside" (Maj. Op., 5 app). Having thus posed the problem, the majority proceeded to simply track, in its own language, all of the declarations of policy, legislative findings, etc., with which the Pennsylvania Act was well fortified, accepted the "purchase of services" concept as bona fide (appellants contended that discovery and evidence would demonstrate that it was a subterfuge), and disposed of other allegations of the Complaint as to which proof would have been offered by making no reference to them in the Opinion.

If the decision of the majority below were to prevail, it would, in one stroke, validate the efforts of the legislatures of the formerly *de jure* segregation states, to perpetuate school segregation via subsidies to "private" schools by binding the judiciary to those facts, policies and purposes which the legislature itself declared.

Particularly in First Amendment and equal protection areas, it is and historically has been the marked proclivity of legislatures bent upon accomplishing some political or

social measure, where the object or the means appear to be of doubtful constitutionality, to camouflage their handiwork. Frequently this is done by setting forth in a preamble or in declarations of legislative policy and legislative findings constitutionally self-serving material. The majority of the lower court misapplied the general policy which counsels avoidance of analyzing the motives of legislatures and legislators, converting this into an absolute rule that they were in effect bound by the legislature's own determination of the primary purpose and effect of the legislation.

But of even greater significance to the Supreme Court, and to the law of church-state, is the fact that in so doing the majority of the lower court avoided the rule of *substantive* law that legislation of this kind must fall if either its primary purpose or effect is to aid or hinder religion by misapplying a rule of statutory construction. As the test was formulated in *Abington School Dist. v. Schempp, supra,* and *Bd. of Education v. Allen, supra,* and said in the latter to have been "based on Everson, Zorach and McGowan and other cases", there is not the slightest suggestion that the judiciary, in making its determination of primary purpose and effect should be bound by what the legislature, whose product is before the Court for constitutional scrutiny, said was the primary purpose and effect.

Since the majority below, aside from passing on standing, did no more than find from the face of the Act a secular purpose and effect, the other substantial questions involved in this appeal are in the form of errors, *sub silentio,* by the lower court.

Thus, there is the substantial question as to whether the avowed *secular* objectives proclaimed by the legislature and accepted by the court can be accomplished by employing religious institutions. Appellants' contention that the Act (even accepting facially its proclaimed secular purpose),

was defective because it, in Madison's words, "employed religion as an engine of civil policy", is a substantial question, but it was not treated by the court below.

A substantial question for the Supreme Court is also presented with respect to the Pennsylvania Act's preference of one religion over another. Appellants offered to prove that well over nine out of ten of all nonpublic school pupils and nonpublic schools were Catholic parochial schools and that the effect of the Act was almost exclusively, therefore, to benefit the Catholic religion in preference to all others, and that this was an unconstitutional preference even if the Act also accomplished a secular purpose. *Sub silentio* the majority ruled that such an allegation, with the offer of such proof, did not state a cause of action under the First Amendment of the United States Constitution.

This case also presents a substantial question of whether the Pennsylvania Act creates an impermissible interdependence between religion and the state in violation of the rule, as stated by *Abington School Dist. v. Schempp, supra,* which forbids "a fusion of governmental and religious functions or a concert or dependency of one upon the other" (at 222). To a degree, this interdependence is inherent and apparent on the fact of the Act. Discovery and trial would have established further aspects of interdependency, including policing of classroom content, regulation of textbook content and auditing. Two questions are substantial on this point: whether the whole legislative scheme, as discernible on the face of the Act, does not create an impermissible interdependency (as Chief Judge Hastie, dissenting, concluded), since the Act avowedly says that the state is dependent (or by this Act becomes dependent) upon religious institutions in order to effectuate its mandated duty to public education; and whether, in any event, the plaintiffs below should not have been permitted by the usual process of discovery, depositions, and the production of documents to

show the degree and extent of such interdependency in terms of supervisory and regulatory state impingement upon religious institutions. Discovery is particularly needed to ascertain how the provisions of Sec. 5603(3) of the Act, forbidding "any subject matter expressing religious teaching, or the morals or forms of worship of any sect," in the subsidized subjects is to be enforced by the state.

This ground of unconstitutionality was not adverted to by the lower court majority.

The Fourteenth Amendment.

The lower court adopted a very narrow view of *Flast v. Cohen*, 392 U.S. 83 (1968), in holding that even the one taxpayer who had paid the precise tax from which the funds for the subsidy were derived, although a Negro with children in the public schools, could not raise the equal protection issues which alleged harm to the public schools unless it were alleged that his particular children were refused admittance to a school receiving aid. Appellants contend that the nexus between the putative party's taxpayer status and the particular grounds for his attack upon legislation as delineated in *Flast* was intended to be a generic test and that that nexus exists with respect at least to the appellant Alton Lemon. The Supreme Court should rule on this point, if it be considered open, and the question has particular importance where, as here, a decision on standing has prevented evidentiary development of the discrimination charges.[5]

5. Under the rule of the Eastern District of Pennsylvania and the Third Circuit (and also at least the First Circuit), that a complaint may not be dismissed unless it appears to a certainty that plaintiff is entitled to no relief under *any state of facts which could be proved* in support of the claim, appellants, in argument and briefing below, set forth statistical material from reliable sources which they offered to prove and which demonstrated that the non-public school system of Pennsylvania was overwhelmingly a white school system as to students, teachers and administrators and employees, with the addition, in the Catholic parochial school system, of several all-black, mission-type schools in the ghetto of Philadelphia.

Even more than that, with respect to the First Amendment aspect of the case, the making of an evidentiary record by discovery and trial is essential to enable the court adequately to deal with the equal protection violation.

The ruling giving taxpayer standing only to the one plaintiff who had paid the tax on racetrack admissions appears to be a narrowing of standing in First Amendment cases not required by *Everson v. Board of Education,* 330 U.S. 1 (1946).

The ruling of the court below that none of the plaintiffs had standing to raise the equal protection question is at variance with the result, if not the holding, of *Burrows v. Jackson,* 346 U.S. 249 (1953) and the line of cases beginning with *Baker v. Carr,* 369 U.S. 485 (1962).

Respectfully submitted,

HENRY W. SAWYER, III,
Attorney for Appellants.

February, 1970.

APPENDIX.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA.

Before WILLIAM H. HASTIE, *Chief Judge, Circuit Court,* ALFRED L. LUONGO and E. MAC TROUTMAN, *Judges,*

District Court

OPINION AND ORDER.

TROUTMAN, *J.*

The present suit seeks to enjoin the alleged unconstitutional approval and expenditure of State funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act [1] (hereinafter the Education Act). Since the complaint alleges the unconstitutionality of a statute of statewide application, this three-judge panel has been convened. 28 U.S.C. §§ 2281-84.[2]

Jurisdiction is based on the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 28 U.S.C. § 1343. Presently before the Court are defendants' motions to dismiss for lack of standing and for failure to state a claim upon which relief can be granted.

The individual plaintiffs are citizens and taxpayers of the Commonwealth of Pennsylvania and their claims are brought in that capacity. Plaintiff Lemon, in addition to being a citizen and taxpayer, is a Negro parent of a child attending public school in Pennsylvania. The organizational plaintiffs are associations of persons resident in the Commonwealth of Pennsylvania which "share as a common objective the separation of Church and State and the opposition to the use of public funds for the support in whole or

1. Nonpublic Elementary and Secondary Education Act, 24 P.S. § 5601 et seq. (Supp. 1969). The complete text of the statute appears in Appendix A, *infra.*

2. See *Ex parte Bransford,* 310 U.S. 354 (1940).

in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion."[3] The National Association for the Advancement of Colored People, (NAACP) with which the plaintiff, Pennsylvania State Conference of the NAACP, is affiliated, "is an organization whose purpose is to seek the elimination of racial discrimination through resort to judicial proceedings and otherwise".[4] Each of the organizational plaintiffs asserts its standing to sue as a party-plaintiff in the instant suit.

The defendant Kurtzman is the Pennsylvania Superintendent of Public Instruction who is responsible for approving the allocation of funds under the Pennsylvania Education Act. Defendant Sloan is the State Treasurer of the Commonwealth of Pennsylvania who will allocate the approved funds. The seven defendant schools are sectarian elementary and secondary educational institutions situated within the Eastern District of Pennsylvania, who have contracted with the Commonwealth for the purchase of secular educational services under the Education Act.[5]

I.

The Nonpublic Elementary and Secondary Education Act.

The Education Act was signed into law by the Governor of Pennsylvania on June 19, 1968. The Act empowers the State Superintendent of Public Instruction to contract for the purchase of "secular educational services" from

3. Complaint at p. 2.

4. Complaint at p. 2.

5. The Pennsylvania Association of Independent Schools (PAIS) has been permitted to intervene as a party-defendant for the limited purpose of arguing the defendants' motion to dismiss.

nonpublic schools located in the Commonwealth of Pennsylvania which fulfill the compulsory school attendance requirements under Pennsylvania law.

In its legislative findings and declaration of policy[6] the Pennsylvania Legislature has determined that a crisis exists in elementary and secondary education in Pennsylvania due to rapid increases in costs and school population and consequent demands for more teachers and facilities. It was also found that twenty per cent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's compulsory school attendance laws in nonpublic schools. It has been further recognized that elementary and secondary education constitutes a public welfare purpose and that nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of this public purpose. The Legislature, therefore, concluded that it is a governmental duty to support the achievement of this public welfare purpose by supporting the purely secular objectives of nonpublic education.

Briefly, the operational scheme of the statute permits the Superintendent of Public Instruction to enter into contracts[7] with nonpublic schools, whether sectarian or nonsectarian, for the purchase of "secular educational services". These "secular educational services" are defined[8]

6. 24 P.S. § 5602, Appendix A, *infra*.

7. The Pennsylvania Supreme Court has recognized that the State may contract with sectarian institutions for the purchase of needed public services. *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507 (1956). Furthermore, Pennsylvania has also recognized that such contracts are not "appropriations" to aid such organizations under the Pennsylvania Constitution, Art. III, § 29. *Schade, supra;* see also *Commonwealth v. Perkins*, 342 Pa. 529 (1941). Apparently, the reason for adopting a contractual method for carrying forth the aims of the Education Act was to avoid possible conflicts with the strictures of the Pennsylvania Constitution. Regardless of the method employed to distribute funds under the Education Act, the constitutional result we reach today would not be changed. As long as the purpose and primary effect of the statute neither advances nor inhibits religion, the constitutional standard is satisfied.

8. All definitions appear in 24 P.S. § 5603, Appendix A, *infra*.

to mean "providing of instruction in a secular subject", while secular subject is defined as "any course which is presented by the public schools of the Commonwealth and shall not include any subject-matter expressing religious teaching, or the morals or forms of worship of any sect". All purchases of secular educational services under the Education Act are to be at the "actual cost" of three items of such service: teacher salaries, textbooks and instructional materials. The Education Act further limits all purchases of secular educational services to courses in mathematics, modern foreign languages, physical science, and physical education.[9] As a condition for payment under the Act, the Superintendent of Public Instruction must approve all textbooks and instructional materials employed in the instruction rendered. In addition, a satisfactory level of student performance in standardized tests must have been attained and within five years of the date of the Act all secular educational services for which reimbursement is sought must be rendered by teachers holding State certification equal to the standard for teachers in public schools.[10]

Payment under the Act in discharge of the contractual obligation may be made only after service has been rendered. Section 5607(a) provides in relevant part that:

> Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought

9. The definitions in the "Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act" provide that "Secular educational service purchased under this Act shall consist solely of courses in the subjects of mathematics, modern foreign languages, physical science, and physical education". Definition 8 at p. 3.

10. See 24 P.S. § 5604, Appendix A, *infra*.

in reimbursement. Such account shall be subject to audit by the Auditor General.

Funds for the operation and administration of the Education Act are to be drawn only from the nonpublic elementary and secondary education fund. The monies comprising this fund are to be taken exclusively from the proceeds of State horse racing and harness racing.[11]

Defendants, in their brief, have informed the Court that 1181 nonpublic elementary and secondary schools in Pennsylvania, having a total pupil population of 535,215 children, and located in 55 of Pennsylvania's 67 counties, are now under contract with the Commonwealth pursuant to the Education Act. *One year's performance under contract has now been rendered and, on September 2, 1969, the Commonwealth paid its first quarterly installment obligation.*

II.

Standing of the Individual and Organizational Plaintiffs.

The defendants have moved pursuant to Rule 12(b) to dismiss plaintiffs' complaint on the grounds that both the organizational and individual plaintiffs lack standing to maintain the instant suit under the religious clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment.[12]

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11. Section 5606 of the Act prohibits the use of any monies raised by the Commonwealth for the support of the public schools to pay for services or administrative costs under the Education Act. In December, 1968, extensive regulations were promulgated by the Superintendent of Public Instruction which further delineate the details and operating procedures of the Act and further elaborate its secular, fiscal, and quality controls.

12. For the purposes of standing, we consider plaintiffs allegations under the Civil Rights Act, 42 U.S.C. § 1343, to be substantial —equivalents to the equal protection claims raised. We have made, therefore, no separate analysis of standing under the Civil Rights Act, but rather treat these contentions in our analysis of standing under the equal protection clause.

A. Organizational Plaintiffs.

The organizational plaintiffs assert their standing solely on the ground that they are organizations established for the purposes of either maintaining the separation of Church and State or preventing racial discrimination. Nothing further is alleged with respect to the issues of the instant case than the fact that these organizations share a common interest in the outcome of this suit as it may or may not comport with their particular organizational goals. The fundamental aspect of standing, as recently articulated by the Supreme Court, is that "it focuses on the party seeking to get his complaint before a federal court . . ." *Flast v. Cohen*, 392 U.S. 83, 99 (1967). The *Flast* decision further noted that "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a *personal stake* in the outcome of the controversy' . . . and whether the dispute touches upon '*the legal relations of parties having adverse legal interests*. . . .'" *Flast v. Cohen, supra*, at 101. (Emphasis added.)

On the basis of the allegations set forth in the complaint as they pertain to the organizational plaintiffs, we can perceive of no *personal stake* or *adverse legal interests* of these plaintiffs which demonstrate their standing as *parties* to the instant suit. Regardless of the good motives of these organizations, the mere fact that the instant case may result in a decision which may be in accord with or adverse to the respective general purposes of these organizations we believe is insufficient to establish standing to sue as an affected party in interest.[13] Consequently, the organizational plaintiffs have failed to establish standing as to

13. The organizational plaintiffs have argued that they should be permitted to sue here as private attorneys general. The Court, however, perceives no precedent or persuasive reason to adopt this theory in the instant case. Indeed, to do so may result in the rendering of an advisory opinion on a constitutional matter in contravention of Article III of the Constitution. See *Muskrat v. United States*, 219 U.S. 346 (1911).

both the religious and equal protection issues involved in the instant case.

B. Individual Plaintiffs.

The individual plaintiffs, Alton Lemon, Priscilla Reardon and Betty J. Worrell, assert standing under the religious clauses of the First Amendment and the equal protection clause based upon varied allegations of status as to each issue.

Initially, it is alleged that all individual plaintiffs are taxpayers of the Commonwealth of Pennsylvania. Plaintiff Lemon alleges he has paid an admission fee to a Pennsylvania race track. Such fees provide the sole financing of the Education Act. The other individual plaintiffs have not alleged payment of such admission fees.

As to plaintiff Lemon's standing as a taxpayer under the establishment and free exercise clauses of the First Amendment, again we note that the focus is on the party asserting his claim. In this respect, however, "[i]t is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen,* supra, at 103. Although the *Flast* decision concerned itself with the status of a federal taxpayer to challenge a federal spending program under the establishment and free exercise clauses of the First Amendment, we consider that its requirements as to standing apply as well to state taxpayers. *Flast* dictates two requirements for taxpayers standing, namely that: "First the taxpayer must establish a logical nexus between that status and the type of legislative enactment attacked" 392 U.S. at 102, and "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged". 392 U.S. at 102. In *Flast,* both elements were satisfied since it was alleged that the taxing and

ending powers of the federal government were being
d in excess of the specific constitutional limitations im-
sed upon their exercise by the First Amendment. See
U.S. at 103. Since the First Amendment applies to
ate governmental powers, *Cantwell v. Connecticut*, 310
S. 296 (1940), the exercise of State taxing and spending
equally limited. These are precisely the allegations made
plaintiff Lemon in the instant case. We, therefore, hold
t he has by these allegations demonstrated standing to
llenge the Education Act under the establishment and
e exercise clauses of the First Amendment.

The other individual plaintiffs assert generally that
y are taxpayers in Pennsylvania. However, they have
alleged the payment of any tax which would bring them
hin the class of affected taxpayers. *Doremus v. Board
Education*, 342 U.S. 429 (1952); *Murdock v. Pennsyl-
nia*, 319 U.S. 108 (1943). Rather, these plaintiffs allege
t they have not paid an admission fee to a Pennsylvania
e track because to do so would require them to pay tax
the support of religion in violation of their rights of
nscience. The personal right to freedom of conscience
protected by the free exercise clause of the First Amend-
nt and the State may not condition other rights or priv-
ges upon the sacrifice of this freedom. See *Sherbert v.
rner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S.
8 (1961). Although the privilege to attend a race track
re asserted and its connection to free exercise is less
parent than in either of the above cited cases, we will
cognize it for the purpose of establishing the standing
these plaintiffs.

The remaining question is whether any of the individ-
l plaintiffs have standing to challenge the Education Act
equal protection grounds. It is alleged generally in the
mplaint that the private schools which have contracted
will contract with the Commonwealth under the Educa-

tion Act intentionally discriminate in the selection of students and/or teachers or are de facto segregated by race or religion. It is further alleged that the funds allocated by the Commonwealth to these schools under the Act will be used to perpetuate and support these practices and as such there is State action involved. We will assume for the purpose of deciding this aspect of the standing issue that these alleged facts could be proved at a hearing on the merits. Nevertheless, these plaintiffs lack standing to challenge the Education Act under the equal protection clause of the Fourteenth Amendment.

The Education Act on its face does not use religion or race as a standard or guideline to determine who may enter into a contract with the Commonwealth. As such the Act itself does not purport to make any classifications to deny equal treatment to members of any particular race or religion. As we previously noted, the requirement of standing focuses on the party affected and his personal stake in the outcome of the litigation at issue. Plaintiff Lemon asserts his status as a Negro and parent of a child in a public school in Pennsylvania. However, there is no allegation in the complaint which asserts that Lemon or his child is personally affected by any alleged intentional discrimination or de facto segregation in these schools. There is no allegation that Lemon's child attempted to enroll at any of these schools and was denied admission because of race or religion. None of the other plaintiffs' allegations point to any interest, parental or otherwise, which has been or may be affected by the alleged discriminatory practices. The absence of an allegation that the personal rights of these parties are affected has the net effect of seeking to raise hypothetical grievances of others who *may be* personally injured by such discrimination. Standing requires at least that the plaintiff himself be personally affected.

Flast, supra, at 110. See also *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Race is indeed a relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies or laws where he himself was not the object of such practice.[14] Consequently, as none of the individual plaintiffs have alleged a personal stake in the instant case, they have failed to establish standing under the equal protection clause.

III.

Establishment and Free Exercise.

We consider now the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted. In this posture of the case we accept as true all well-pleaded allegations of fact in the plaintiffs' complaint. The plaintiffs allege as a fact that the purpose and primary effect of the Education Act is to aid religion. For the purpose of considering the motion to dismiss it is argued that the allegation of the purpose and primary effect of the Education Act in the complaint must be deemed admitted. While it is true that well-pleaded facts in the complaint are deemed admitted for the purpose of testing its sufficiency, such an admission does not include legal conclusions drawn from these facts. *Newport News Co. v. Schauffler*, 303 U.S. 54, 57 (1937); *Pauling v. McElroy*, 278 F. 2d 252, 253-254 (D.C. Cir. 1960). We believe that the allegation asserts not a fact but a conclusion of law and as such is not admitted for purposes of testing the sufficiency of the complaint. The question of law then

14. *See e.g. Burton v. Wilmington Parking Authority*, 365 U.S. 716 (1961); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963) *cert. denied* 376 U.S. 938 (1964); *Deal v. Cincinnati Board of Ed.*, 369 F.2d 55 (6th Cir.) *cert. denied* 389 U.S. 847 (1966).

presented is whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion.[15]

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This limitation originally placing a restriction only on federal governmental involvement in religion has since been judicially incorporated into the Fourteenth Amendment and now represents a bar on State as well as Federal action. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The meaning and scope of the First Amendment have been elaborated several times by the decisions of the United States Supreme Court in areas involving education. Most apposite to the instant case are the Supreme Court's decisions in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 336 (1968). In *Everson*, the Supreme Court held that a New Jersey statute which authorized State reimbursement to parents for bus fares of children attending both public and parochial schools did not violate the establishment clause of the First Amendment. The Court noted that the establishment clause prohibits the states from setting up a church or supporting the religious activities of sectarian institutions. 330 U.S. at 16. However, the Court further observed that a State may not hamper citizens from receiving the benefits of public welfare legislation by excluding religions from its benefits. *Id.* The

15. More specifically, with respect to the establishment clause, in paragraph 18 of the complaint it is alleged that the Act (1) "has as its purpose the advancement of religion", and (2) "finances and participates in the blending of sectarian and secular education", (3) "provides for direct financial aid out of State funds to sectarian schools", and (4) "has as its primary effect the advancement of religion".

First Amendment "requires the State to be neutral in its relations with groups of religious believers and non-believers. . . ." 330 U.S. at 18. As bussing was generally in the same category as other government services provided to parochial schools such as ordinary police and fire protection, sewage disposal, public highways and sidewalks, this measure of aid, as it benefited school children, could be constitutionally extended without breaching the standard of government neutrality toward religion embodied in the First Amendment.

Most recently, in *Board of Education v. Allen,* 392 U.S. 236 (1968) the Court sustained, over First Amendment objections, legislation in New York which required the State to lend textbooks free of charge to all children in private sectarian and non-sectarian schools. The Court recognized that "*Everson* and later cases have shown that the line between State neutrality to religion and State support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree'. Zorach v. Clauson, 343 U.S. 306, 314 (1952). See McGowan v. Maryland, 366 U.S. 420 (1961)". *Id.* The Court re-examined its prior decisions and articulated a pragmatic standard, first espoused in *Abington School District v. Schempp,* 374 U.S. 203 (1963), by which to test legislation designed to achieve a public objective through religiously affiliated educational institutions. To distinguish between "forbidden involvement of the State with religion and those contacts which the Establishment Clause permits" the Supreme Court stated:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that

> to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U.S. at 222.

Although the results of the *Everson* and *Allen* decisions were to provide some measure of indirect aid to parochial schools in that transportation to receive religious instruction was facilitated and that the parochial schools' funds were no longer required to purchase certain books, such results did not constitute a breach of State neutrality towards religion. In applying the purpose and primary effect test to the New York statute in *Allen*, the Supreme Court reasoned that "[t]he express purpose of section 701 was stated by the New York legislature to be furtherance of the educational opportunities available to the young. . . . The law merely makes available to all children the benefits of a general program to lend books free of charge." 392 U.S. at 243. Although a distinction between bussing and books was recognized, since the latter may be used as a vehicle of religious teaching, the Court noted that the language of the New York statute neither authorized nor permitted loans or distributions of religious literature. Properly, the Court was not willing to assume that New York's administrators would violate the terms of the statute; accordingly, it was held that the principal of neutrality was satisfied and the primary effect of the statute was not to advance religion. See 392 U.S. at 244, 245.

It is here argued that Pennsylvania's Education Act has as its purpose and primary effect the advancement of religion. We believe that the purpose of the Education Act can be found clearly on its face. The Legislature has declared that the purpose of the Education Act is "to promote the welfare of the people of the Commonwealth of Pennsylvania" and "to promote the secular education of children

attending nonpublic schools". Support for this declaration of purpose is found in specific legislative findings which point to the percentage of school-age children educated in Pennsylvania's private institutions, the rising cost of education, increased school population and demands for more qualified teachers and adequate facilities. Furthermore, the Legislature also recognized the potential financial burden on the public treasury and long-range impairment of education which may result if private institutions no longer bear their present educational burdens. The plaintiffs argue that because the vast majority of schools which will contract for the purchase of secular educational services under the Education Act are sectarian schools, the purpose or operative effect of the instant statute must be to support religion. We cannot accept the plaintiffs' argument. "The fact that a State law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a Legislature has erroneously appraised the public need." *Everson v. Board of Education*, 330 U.S. at 6. The purpose of the statute on its face indicates that "[the State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded". 392 U.S. at 247. The plaintiffs urge that we re-examine the legislative history of the statute and contend that such an examination will disclose that the true intent of the Pennsylvania legislators was to aid religion. We do not, however, feel that it is necessary or appropriate in the instant case to re-examine the legislative history of the Education Act in search of the "true intent" of Pennsylvania's legislators. The legislative findings of the State are not to be lightly set aside. In this connection, Mr. Justice Frankfurter has observed that:

> [T]he private and unformulated influences which may work upon legislation are not open to judicial probing.

> "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." McCray v. United States, 195 U.S. 27, 56. "Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." (Citations omitted.) *McGowan v. Maryland*, 366 U.S. at 496.

The education of our nation's children quite properly has been recognized by the Supreme Court as a proper subject of legislation enacted in furtherance of a public interest. *Cochran v. Board of Education*, 281 U.S. 370 (1930). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning; rather, educational goals may effectively be satisfied through private education. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As a sensible corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory education laws through private educational institutions, the *Allen* Court observed:

> [I]f the State must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular educational function. 392 U.S. at 236.

We recognize that "private education . . . is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," 392 U.S. at 247, and that the public's reliance on private education suggests that adequate *secular* education is being provided in these schools. We further recognize, as did the Supreme Court in *Allen*, that the "State's interest in education may be suf-

ficiently served by reliance *on the secular teachings which accompany religious training''* in nonpublic schools. 392 U.S. at 245. Furthermore, we consider that "religious schools pursue two goals, religious instruction and secular education", 392 U.S. at 245, and we believe that the State may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Education Act on its face authorizes the Commonwealth to contract only for services connected with the *strictly secular* function of educating Pennsylvania's school children in the secular subjects of mathematics,[16] physical sciences,[17] modern foreign language,[18] and

16. In the Regulation to the Education Act mathematics is defined as follows:

> 12. "Mathematics" shall mean the science of numbers and their operations, interrelations, combinations, generalizations, and abstractions, and of space configurations and their structure, measurements, transformations, and generalizations. It includes the study of number, space, and structural patterns. Branches of mathematics include arithmetic, algebra, geometry, trigonometry, calculus, analysis, probability, statistics, logic, and number theory.

17. Physical Science is defined as

> 15. "Physical science" is organized knowledge about the physical composition and structure of phenomena and the process of relating quantitative or qualitative description of physical phenomena related to time, space, mass, or derived concepts in a manner that is in agreement with all observed properties of these phenomena. "Physical science" includes the basic sciences of chemistry, physics, astronomy, geology, physical oceanography, and meteorology as well as the areas of specialization derived from these.

18. Modern foreign languages does not include the teaching of traditional church related classic languages such as Latin or Greek.

> 13. "Modern Foreign languages" is a term collectively applied to the study of pronunciation, grammar, composition and reading of foreign languages in contemporary use, as contrasted with that of the ancient, or "dead", languages commonly called the classics.

physical education.[19] That the Commonwealth must not be involved in the religious functions of sectarian educational institutions is clearly established by the nature and kind of strictly secular subjects selected in the statute itself and the controls and restrictions placed upon the statute's operation by the regulations promulgated thereunder. Thus limited and restricted we cannot hold that the statute advances religion either in purpose or primary effect. Moreover, the statute applies to *all* nonpublic schools both sectarian and non-sectarian. As it may apply to sectarian institutions, we concur with the Supreme Court's statement in Allen, supra, that "*we cannot agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." (Emphasis added.) 392 U.S. at 248.

Administered within its narrow confines neither the primary nor the necessary operative effect of the statute advances religion. It is quite unlike the situation where State tax-supported public school buildings, facilities and teachers are used as a forum and means for the dissemination of religious doctrines at times and on occasions when

19.

14. "Physical education" refers to that part of the school program which provides guidance and instruction through physical activities designed to meet the needs of pupils in developing their physical efficiency and recreational skills, and, along with other phases of the curriculum, provides maximum opportunity for growth physically, mentally, emotionally, and socially. It includes adaptive physical education for those pupils who, because of health reasons, are unable to participate in regular classes. "Physical education" does not consist of instruction in music, driver education, military training, or extramural or interscholastic athletics and/or sports. Health instruction is not considered physical education.

Physical education does not include sex education or other areas which may be deemed religiously oriented.

pupils are subject to the State's compulsory attendance laws. *McCollum v. Board of Education*, 33 U. S. 203 (1948); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). On the contrary, the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. The statute is further limited and confined to the purchase of services at cost. Unlike *Schempp* and *Engel* the statute here maintains a position of complete *religious* neutrality. In *Zorach v. Clauson*, 343 U.S. 306, the Court approved the State's encouragement of "religious instruction" and its cooperation "with religious authorities".[20] Here the Education Act does not go so far as to encourage the teaching of religious matter. We recognize that the separation of Church and State embodied in the non-establishment principle is not a self-defining concept. The increasing national concern for education in our society, coupled with the public awareness that private schools are performing a significant public service in educating great numbers of school-age children, necessarily makes the State interested in private education. Of necessity therefore:

> As the State's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Most aim at human good, and in their respective views of what is good for many they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay. McGowan v. Maryland,

20. The Court in *Zorach* stated:

When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . 343 U.S. at 313.

366 U.S. 420, 462 (1966). (Separate opinion of Mr. Justice Frankfurter).

That such a common interest in education exists is desirable if not essential to the continued existence of a free society so long as the State's function is, as here, carefully defined, limited and confined to secular as opposed to sectarian matters. We do not view the First Amendment as requiring an absolute separation between necessarily overlapping interests in the secular education of school-age children. To require such a standard would assume that the State and religion exist in mutually exclusive and sharply defined spheres having no common natural interest in the education of our youth. Such a view would not comport with the extension of even police or fire protection or other governmental services in the public interest.

Nor do we find persuasive the argument that the child must be the direct beneficiary of government funds which support secular education. Such an approach would place form over substance in that a constitutional result would depend upon minute distinctions and technicalities. The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers. In our view the constitutional result should not and cannot wholly depend upon the identity of the payee. The use to which the funds are put must be the primary concern.[21]

The mandate of the First Amendment is neutrality with respect to religious teachings, beliefs and practices. The Education Act does not employ religion as its standard. The prerequisites to receiving government funds for the

21. The Supreme Court in *Allen* implicitly recognized this when it noted the secular books on loan under New York's statute were ordered and stored by the parochial schools but were furnished for the *use of individual students*. As such this secular use was in conformity with the Constitution. 392 U.S. at 244 n.6.

purchase of secular educational services, we believe, are designed to maintain the neutrality required by the First Amendment. While it may be argued that the consequential result of the instant statute may be to indirectly benefit nonpublic sectarian schools, the purpose and primary effect of the Education Act is secular in nature and such an incidental benefit is not sufficient to infringe upon the non-establishment principle of the First Amendment. As was noted by Mr. Justice Harlan, concurring in *Board of Education v. Allen,* supra:

> [W]here the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State, and where the activity does not involve the State, 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom . . . it is not forbidden by the religious clauses of the First Amendment. 392 U.S. at 249.

Admittedly, the line is not an easy one to draw. However, we believe the Education Act is consistent with neutrality towards religion and comes within the permissible limits and spirit of the non-establishment principle. Consequently, we will dismiss the plaintiffs' complaint under the establishment clause.

Plaintiffs also allege in their complaint that the Education Act on its face and in its necessary operative effect denies them the free exercise of religion. With respect to each of the plaintiffs, it is alleged that "[i]t is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools". It is also alleged that the Act "constitutes compulsory taxation for the support of religion or religious educational institutions."

With respect to the latter allegation, as we have decided that the Education Act in purpose and primary effect does not advance or support religion, such taxation, assuming arguendo that it is compulsory, is not for the support of religion. Consequently, this allegation must fall. With respect to the former allegation, it is the purpose of the free exercise clause of the First Amendment "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority". *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). There is no allegation in the plaintiffs' complaint as to what their particular religious beliefs are nor how the Education Act, by authorizing the purchase of secular educational services, coerces them in the practice of their religion. In dismissing the free-exercise allegation in *Board of Education v. Allen, supra*, the Supreme Court stated:

> Appellants also contend that '§ 701 offends the Free Exercise Clause of the First Amendment. However, it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion' Abington School District v. Schempp, 374 U.S. 203, 223 . . . and appellants have not contended that the law in any way coerces them as individuals in thet practice of their religion. 392 U.S. at 248.

Since these essential allegations are also lacking in this case plaintiffs have failed to state a claim under the free-exercise clause of the First Amendment and, therefore, their complaint will be dismissed. In view of our disposition of defendants' motions to dismiss, we need not consider the remaining motions.

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

ORDER.

AND NOW, this 28th day of November, 1969, IT IS ORDERED that:

1. Defendants' motion to dismiss the complaint as to the organizational plaintiffs for lack of standing on all issues raised herein is GRANTED.

2. Defendants' motion to dismiss the complaint as to plaintiff Lemon for lack of standing under the religious clauses of the First Amendment is DENIED.

3. Defendants' motion to dismiss the complaint as to the remaining individual plaintiffs, Priscilla Reardon and Betty J. Worrell, for lack of standing as taxpayers under the establishment clause is GRANTED.

4. Defendants' motion to dismiss the complaint as to individual plaintiffs Reardon and Worrell for lack of standing under the free-exercise clause is DENIED.

5. Defendants' motion to dismiss the complaint as to all individual plaintiffs for lack of standing under the equal protection clause is GRANTED.

6. Defendants' motion to dismiss the complaint for failure of all plaintiffs to state a claim upon which relief can be granted is GRANTED.

BY THE COURT,

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

APPENDIX A.

§ *5601. Short title.*

This act shall be known and may be cited as the "Nonpublic Elementary and Secondary Education Act."
1968, June 19, P. L. —, No. 109, § 1.

Title of Act:

An act to promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; creating a Nonpublic Elementary and Secondary Education Fund to finance the purchase of secular educational services from nonpublic schools located within the Commonwealth of Pennsylvania for the benefit of residents of the Commonwealth of Pennsylvania; authorizing the Superintendent of Public Instruction to enter into contracts to carry out the intent and purposes of this act, and to establish such rules and regulations as are necessary; providing for the payment of administrative costs incident to the operation of the act; providing procedures for reimbursement in payment for the rendering of secular educational service; and designating a portion of revenues of the State Harness Racing Fund and of the State Horse Racing Fund as the sources of funds. 1968, June 19, P.L. —, No. 109.

§ *5602. Legislative finding; declaration of policy.*

It is hereby determined and declared as a matter of legislative finding—

(1) That a crisis in elementary and secondary education exists in the Nation and in the Commonwealth involving (i) the new recognition of our intellectual and cultural resources as prime national assets and of the national imperative now to spur the maximum educational development of every young American's capacity; (ii) rapidly increasing

costs occasioned by the rise in school population, consequent demands for more teachers and facilities, new but costly demands, in the endeavor for excellence, upon education generally; the general impact of inflation upon the economy; and the struggle of the Commonwealth, commonly with many other states, to find sources by which to finance education, while also attempting to bear the mounting financial burden of the many other areas of modern State governmental responsibility;

(2) That nonpublic education in the Commonwealth today, as during past recent decades, bears the burden of educating more than twenty percent of all elementary and secondary school pupils in Pennsylvania; that the requirements of the compulsory school attendance laws of the Commonwealth are fulfilled through nonpublic education;

(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education;

(4) That freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;

(5) That the Commonwealth has the right and freedom, in the fulfillment of its duties, to enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian;

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children

to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

1968, June 19, P. L. —, No. 109, § 2.

§ *5603. Definitions.*

The following terms whenever used or referred to in this act shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(1) "Nonpublic Elementary and Secondary Education Fund" shall mean the fund created by this act.

(2) "Secular educational service" shall mean the providing of instruction in a secular subject.

(3) "Secular subject" shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect.

(4) "Nonpublic school" shall mean any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law.

(5) "Purchase secular educational service" shall mean the purchase by the Superintendent of Public Instruction from a nonpublic school, pursuant to contract, of secular educational service at the reasonable cost thereof.

(6) "Reasonable cost" shall mean the actual cost to a nonpublic school of providing a secular educational service and shall be deemed to include solely the cost pertaining thereto of teachers' salaries, textbooks and instructional materials.

1968, June 19, P. L. —, No. 109, § 3.

§ *5604. Nonpublic Elementary and Secondary Education Fund.*

There is hereby created for the special purpose of this act a Nonpublic Elementary and Secondary Education Fund dedicated to the particular use of purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science, and physical education, provided, however, that as a condition for payment by the Superintendent of Public Instruction for secular educational service rendered hereunder, the Superintendent of Public Instruction shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification approved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition.

1968, June 19, P. L. —, No. 109, § 4.

§ *5605. Administration.*

The administration of this act shall be under the direction of the Superintendent of Public Instruction, who shall establish rules and regulations pertaining thereto, make contracts of every name and number, and execute all instruments necessary or convenient for the purchase of secular educational service hereunder. All expenses incurred in connection with the administration of this act shall be paid solely out of the Nonpublic Elementary and Secondary Education Fund and no money used for the support of the public schools of the Commonwealth shall be used in connection with the administration of this act.

1968, June 19, P. L. —, No. 109, § 5.

§ *5606. Moneys for Fund.*

(a) Permanent Moneys. Into the Nonpublic Elementary and Secondary Education Fund shall be paid each year:

(1) All proceeds from horse racing up to the first ten million dollars ($10,000,000) realized by the State Horse Racing Fund established by the act of December 11, 1967 (Act No. 331),[1] remaining after, and not required for, payment of all of the items of administrative cost set forth in subsection (b) of section 18 of that act,[2] plus

(2) One-half of all such horse racing proceeds in excess of the sum of ten million dollars ($10,000,000), the remaining half thereof to be paid into the General Fund.

(b) Temporary Moneys. Until the time that proceeds in the amount of ten million dollars ($10,000,000) shall, in a given fiscal year, have been paid into the Nonpublic Ele-

1. 15 P. S. § 2651 et seq.
2. 15 P. S. § 2668.

mentary and Secondary Education Fund as provided for under subsection (a) of section 6 hereof,[3] three-fourths of the proceeds from harness racing realized by the State Harness Racing Fund established by the act of December 22, 1959 (P. L. 1978), as amended,[4] remaining after and not required for, the payments provided for in subsections (b) and (d) of section 16 of that act,[5] shall be paid into the Nonpublic Elementary and Secondary Education Fund according to the following formula:

(1) The entire three-fourths of the harness racing proceeds for any fiscal year shall be paid into the Nonpublic Elementary and Secondary Education Fund until such year as the horse racing proceeds designated by this section for the said fund are of such amount that, combined with the harness racing proceeds, the sum of ten million dollars ($10,000,000) shall have been realized by the Nonpublic Elementary and Secondary Education Fund.

(2) Proceeds from harness racing shall cease to be paid into the Nonpublic Elementary and Secondary Education Fund for any fiscal year in which proceeds from horse racing, designated by this section for the Nonpublic Elementary and Secondary Education Fund, shall equal ten million dollars ($10,000,000).

Moneys in the Nonpublic Elementary and Secondary Education Fund are hereby appropriated to the Department of Public Instruction to be used by the Superintendent of Public Instruction solely for the purchase of secular educational service hereunder and administrative expenses pertaining thereto as provided for in section 5 of this act.[6]

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3. This section.
4. 15 P. S. § 2601 et seq.
5. 15 P. S. § 2616.
6. Section 5605 of this title.

§ 5607. Reimbursement Procedures.

(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered.

(b) Reimbursements for any fiscal year for the purchase of secular educational service hereunder shall not exceed the total amount of the moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund in that fiscal year.

(c) In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund shall be insufficient to pay the total amount of validated requests hereunder in reimbursement for that year, reimbursements shall be made in that proportion which the total amount of such requests bears to the total amount of moneys in the Nonpublic Elementary and Secondary Education Fund.

(d) The Budget Secretary shall, by July fifteenth of each year, certify to the Superintendent of Public Instruc-

tion, the total amount of money in the Nonpublic Elementary and Secondary Education Fund.

1968, June 19, P. L. —, No. 109, § 7.

§ *5608. Effective Date.*

This act shall take effect July 1, 1968.

1968, June 19, P. L. —, No. 109, § 8.

§ *5609. Severability.*

If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or [1] more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

1968, June 19, P. L. —, No. 109, § 9.

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1. Enrolled bill reads "of".

HASTIE, *Chief Circuit Judge,* dissenting.

The basic question we have to decide is whether the Pennsylvania Nonpublic Elementary and Secondary Education Act, No. 109 of June 19, 1968, 24 P.S. § 5601, on its face and construed in the light of certain factual allegations of the present complaint which must be deemed correct on motion to dismiss the complaint, violates the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment.

The Act provides that the state shall pay public funds to applying "nonpublic" elementary and secondary schools to reimburse them for having rendered "secular educational service" through the teaching of certain subjects; namely, mathematics, modern foreign languages, physical science and physical education. Reimbursement to a school is authorized only for the cost of teachers' salaries, textbooks and instructional materials after and to the extent that such costs have actually been incurred by the institution.

The complaint alleges that the great majority of the schools eligible for subsidies under the Act are affiliated with or under the control or direction of churches or are in other respects sectarian schools or schools which teach religion and that the primary purpose as well as the principal effect of the Act is thus to aid religious institutions. For purposes of the present motion the majority opinion properly accepts as factually correct the complaint's allegations as to the religious and sectarian character of most of the schools intended to receive and actually receiving state grants in aid under the Act. However, that opinion characterizes as an allegation of law, and therefore refuse to accept as correct, the allegation that the primary purpose and principal effect of the Act is thus to aid institutions of religion. Instead, the majority seems to view the question of the purpose and effect of the statute as foreclosed by

declarations in the statute itself that the legislative purpose is "to promote the welfare of the people of the Commonwealth" and "to promote the secular education of children attending nonpublic schools". With this I cannot agree.[1] But even if inquiry as to purpose and effect should be confined to examination of the language and scheme of the statute, I cannot avoid the conclusion that the primary purpose and effect of the enactment is to help the nonpublic schools by supplying them with needed financial aid, while whatever promotion of the public welfare is anticipated as a result of such public assistance is at best an incidental consequence claimed in justification of the state's action.

It merits mention at this point that both the statutory text and the majority opinion make much of the concept that the state "contracts to purchase secular educational services". Actually, this phrase is not descriptive of the statutory scheme. A nonpublic school that desires financial aid under the Act need do no more than submit, on a form prescribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called "contract". The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure in asking for aid and later proving that it has made expenditures that are reimbursable under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none. The artificial characterization of this

1. This is not a disposition on summary judgment where the factual posture of the case is established by affidavits and exhibits. Here decision is controlled by the allegations of the complaint and our judgment as to the potentiality of proof thereunder.

procedure as "contracting for secular educational services" does not help solve our constitutional problem.

Certainly the Establishment Clause of the First Amendment does not preclude the state from providing any assistance, no matter how indirect, to religious institutions. As the majority opinion correctly indicates, religion's interest and the state's interest in the public good necessarily overlap. In contemporary experience churches and other religious institutions characteristically, and to their great credit, conceive their mission and undertake their ministry through various social means additional to the fundament of worship. The providing of shelter and care for the needy and aged, education for youth, and other social services for the community are all deemed an important part of organized church work. Yet, in the modern welfare state, similar activities have long since won recognition as important governmental functions and responsibilities, from the performance and discharge of which religious institutions with like undertakings may derive incidental benefits. Thus, where the state has supplied all school children with transportation and books, sectarian educational enterprises are indirectly aided by being relieved of a financial burden which they might otherwise feel obligated to bear. In *Everson v. Board of Education*, 1947, 330 U.S. 1, and *Board of Education v. Allen*, 1968, 392 U.S. 236, the Supreme Court recognized that the Constitution does not preclude a state from thus providing public services directly to its people merely because such services incidently aid religious institutions. However, these cases do not suggest that the Constitution permits direct public financing of a religious enterprise merely because such aid also benefits the state.

It is unrealistic to view the present statute as merely subsidizing secular instruction and thus only incidentally benefiting religious institutions by releasing their funds for religious purposes. The primary purpose for which sec-

tarian schools formulate and offer a comprehensive curriculum apart from the public school system is religious. Through a total educational program offered in a separate religious environment, sectarian schools serve to inculcate and reinforce in children doctrine and moral precepts derived from the tenets of the church. It is not necessary to inquire whether, for the fulfillment of this primary religious purpose every course is taught with religious overtones. The crucial consideration is that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives. When the state reimburses a sectarian school for any part of the curricular costs of such a teaching program it directly finances and supports a religious enterprise. Constitutionally, such subsidizing of a religious enterprise is not essentially different from a payment of public funds into the treasury of a church. Such a prohibited involvement of the state in a religious undertaking is not validated merely because the religious enterprise itself incidentally relieves the state of the cost of educating many children.

Even more important than the foregoing analytical distinction are the constitutionally significant consequential distinctions between the present statute and those considered in the *Everson* and *Allen* cases. The statute in this case, much more than those in *Everson* and *Allen*, invites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions.

It has already been pointed out that sectarian schools are only part of the complex of activities, many of them as "secular" as the teaching of languages and physical science, which modern churches and religious institutions finance and conduct. Charities, hospitals, community centers and homes for the aged and infirm are familiar examples. The theory that would validate Act No. 109 also

unavoidably validates state subsidies for all such enterprises of religious organizations, as well as subsidies for all of the "secular" parts of sectarian education not included in the present statute. If the Constitutional bar to state grants in all such cases should be removed, it is reasonable to anticipate continuing political controversy in every state and local community whether and to what extent public funds are to be granted to subsidize a large number and a broad range of activities of religious organizations. Leaders and devout members of various organized religious groups will see it as their duty to their church or sect to seek such aid and to insist that state and local government contribute liberally to their sectarian enterprises. Legislators, government executives and candidates for elective office in whose judgment other claims upon the public purse merit higher priority can anticipate political opposition as enemies of the faith. In this way religion and politics will become *in pari materia.*

So far we have escaped much of the diviseness and antagonism of political differences and controversies about religious matters because public financing of activities of religious organizations has been understood to be prohibited by our Constitution. Professor Paul Freund has perceptively pointed out that President Kennedy was able to avoid taking a political position upon issues of religious character by relying upon authoritative decisions on the Constitutional separation of state and religion as controlling. Freund, *Public Aid to Parochial Schools,* 1969, 82 HARV. L. REV. 1680, 1692. But if the present statute is held to be Constitutional, I see no escape from the evils that attend a widespread and pervasive intermingling of politics and religion.

The other side of the coin is the inevitability of state intrusion into the affairs of organized religion in the administration of the present statute. As already stated, it is

the justifying imperative of most, if not all, church sponsored and controlled education that formal education shall serve to inculcate and reinforce in youthful minds sectarian doctrine and moral precepts derived from the tenets of the church.[2] In schools with such a mission it is appropriate, practically unavoidable, that admission policies and practices reflect a preference for enrollment of children of the sponsoring faith, though not necessarily excluding all others. Yet, once the state joins in financing such education, the mandated equalitarian position of the state must result in state imposition of strictly non-discriminatory admission standards consistent with public duty,[3] whatever sacrifice of appropriate religious objectives may result. I cannot square such state intrusion into religious affairs with the concept of separation of church and state which the First Amendment implements.

The same is true in the matter of curriculum. If the state is to finance "secular" teaching in parochial and other church related schools, the state must have the power and responsibility of monitoring curriculum and instruction to assure that teaching in these state supported areas is not so oriented as to inculcate sectarian or religious tenets or doctrines. Indeed, Act No. 109 expressly provides for state

2. See L. Pfeffer, Church, State, and Freedom, 1953, 290-300; See also Rev. S. Woywood, The New Canon Law, under imprimatur of Most Rev. Francis Spellman, Archbishop of New York, and others (1940), quoted in *Everson v. Board of Education*, 330 U.S. 1, 18, 22-23 (Jackson, J., dissenting).

3. *Cf.* Evans v. Newton, 1966, 382 U.S. 296; *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715; *Cooper v. Aaron*, 1958, 358 U.S. 1, 16-19; *Pennsylvania v. Board of Directors of City Trusts*, 1957, 353 U.S. 230; *Kerr v. Enoch Pratt Free Library*, 4th Cir. 1945, 149 F.2d 212.

It is difficult to see how the provision of the Pennsylvania Fair Educational Opportunities Act that sanctions religious discrimination in admission policies and practices of sectarian schools could validly be applied to sectarian schools that receive public financing under Act No. 109. 24 P.S. § 5004(c).

approval of text books and teaching materials in all subsidized schools. The substantiality of this involvement is indicated by Mr. Justice Douglas in the course of his dissent in *Board of Education v. Allen,* 392 U.S. 236, 258-62, where he elaborates numbers of instructive examples of sectarian orientation in teaching materials appropriately used in the teaching of "secular" subjects in church related schools. The extent to which religious orientation of secular subjects will become an appropriate subject of state inquiry is also suggested by interrogatories which the plaintiffs in this suit have addressed to the defendant schools. For example, the church related schools have been asked to disclose the extent to which sectarian precepts are involved in the teaching of secular subjects; whether teachers of such subjects are clerics, and what religious materials and symbols are used or displayed in the schools in connection with activities other than religious ceremonies. It is difficult to imagine a type of intrusion by the state more offensive to a religious community than such pervasive monitoring and investigation of instruction and academic organization in order to purge the secular areas of the curriculum of religious orientation. Yet, it is to just such intrusion that the Pennsylvania statute opens the door, if by necessary implication it does not go farther and mandate the entry of state overseers as the only means by which the state can adequately check upon the initial and continuing eligibility of particular "secular" instruction for state financing.[4]

Mr. Justice Goldberg, in *Abington v. Schemp,* 1963, 374 U.S. 203, 248 and Mr. Justice Harlan, in *Board of Education v. Allen,* 392 U.S. 236, 249, have both expressed what I believe to be a sound rationalization that the First Amend-

4. Act No. 109 explicitly restricts state aid to courses which "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect".

ment is violated by state action which will "involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude". I am unable to avoid the conclusion that the state undertaking authorized by Act No. 109 would thus intolerably involve the state in the realm of the sectarian.

It must also be considered that some of the schools eligible for aid under Act No. 109 appear to be non-sectarian private schools which do not include religious training in their educational programs. Obviously, the First Amendment does not debar state aid to such schools. However, the plaintiffs allege and seek to prove statistically that only a very small minority of the eligible schools are of this character and that this fact and the legislative history of the statute combine to show that the primary purpose and effect of the legislation is to aid sectarian schools. I think the plaintiffs should be permitted to show, if they can, that the inclusion of non-sectarian private schools as institutions eligible for state aid is so minor and incidental an aspect of the statutory scheme that it cannot validate the enactment.

It remains to consider the claim that subsidizing the defendant non public schools as authorized by the statute would deny the plaintiffs the equal protection of the laws. I agree with the majority that the organization plaintiffs lack standing to challenge the legislative scheme under either the First Amendment or the Equal Protection Clause. I also agree that no individual plaintiff alleges that any discrimination practiced by any of the defendant schools affects him or his children in a way that would give him standing to litigate the equal protection issue.

Finally, while I agree with the majority that plaintiff Lemon does and the other individual plaintiffs do not have standing to litigate the alleged violation of the Establish-

ment Clause on the basis of the requirements enunciated by the Supreme Court in *Flast v. Cohen,* 1967, 392 U.S. 83, my reasoning is somewhat different and leads to the conclusion that, except for Lemon, the individual plaintiffs lack standing under the Free Exercise Clause even more clearly than under the Establishment Clause.

In *Flast v. Cohen,* federal income taxpayers alleged that the expenditure of federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction in sectarian schools and to purchase educational materials for use in such schools violated the religion clauses of the First Amendment. The taxpayers' bill for a declaratory judgment and an injunction was dismissed by a three-judge district court for lack of standing. The Supreme Court reversed, holding that the plaintiffs had satisfied the requirements of a logical connection between their status as taxpayers and both "the type of legislative enactment attacked" and "the precise nature of the constitutional infringement alleged". 392 U.S. at 102. The Supreme Court relied principally on its finding that the Establishment Clause was designed to limit the taxing and spending powers of Congress and specifically declined to decide whether the taxpayers' free exercise claim alone would confer standing. 392 U.S. at 104 n. 25.

In this case, the ultimate source of funds for the challenged payments under Act No. 109, and the only source, is the admission tax on harness races, 15 P.S. § 2606 (1967), and on thoroughbred races, 15 P.S. § 2656 (Supp. 1969). Plaintiff Lemon alleges that he has paid an admission fee to a harness race, including the tax. All three individual plaintiffs allege that "[i]t is against [their] religious conscience to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools". The majority opinion apparently con-

strues the latter allegation to mean that, except for Lemon, the individual plaintiffs have refrained from attending the races because to do so would require them to support parochial education. However, the complaint contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues to the purposes of Act No. 109, and none of the individual plaintiffs has alleged any particular religious belief or any effect of Act No. 109 on the practice of a particular religion.

The individual plaintiffs other than Lemon can only be considered "taxpayers" within the scope of the standing requirements of *Flast v. Cohen,* if their "tax money is being extracted and spent in violation of specific constitutional protections. . . ." 392 U.S. at 106. The plaintiffs who have not attended horse races have not alleged that their "tax money is being extracted" by Act No. 109 unless by virtue of a theoretical increase in general tax requirements that might result from the failure to allocate racing revenues to general expenses. However, *Flast v. Cohen* pointed out that where a challenged tax operates "upon a particular class of taxpayers . . . the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class". 392 U.S. at 104 n. 25. Although the Supreme Court was referring to taxpayer standing under the Free Exercise Clause in the quoted dictum, the required nexus between taxpayer status and "the type of legislative enactment attacked", 392 U.S. at 102, also depends on actual or threatened liability for a tax in a challenge under the Establishment Clause. In order to have "the requisite personal stake in the outcome", 392 U.S. at 101, the plaintiffs should have an established monetary interest in the relief sought, rather than an interest that will be realized only if judicial action enjoining

expenditures supported by a particular tax program to which plaintiffs are not subject shall result in a decrease in general tax burdens. Therefore, the individual plaintiffs other than Lemon do not have taxpayer standing to challenge Act No. 109 under either of the religious clauses because they do not contribute revenues disbursed under the Act, and are not "taxpayers within the affected class".

On the other hand, such a taxpayer as plaintiff Lemon, who is subject to the tax program that supports the particular statutory scheme sought to be enjoined, "may or may not have the requisite personal stake in the outcome . . . ." 392 U.S. at 101. Focusing upon the nexus between Lemon's status as a taxpayer and "the precise nature of the constitutional infringement alleged", 392 U.S. at 102, Lemon does complain that he has been required to contribute in support of an establishment. Although Lemon was not compelled to attend a harness race, he has been constrained by the state government to pay a tax on his attendance, a tax that is specifically earmarked by statute for purposes that allegedly support an establishment of religion. In view of the primary function of the Establishment Clause in restraining taxation and disbursement in support of religion, the tax Lemon has paid possesses a sufficient connection to the challenged expenditures under Act No. 109 and to the alleged Constitutional infirmity of the Act to lend the requisite specificity and adverseness to his claim. Accordingly, I conclude that plaintiff Lemon has standing to attack the validity of the legislation under the Establishment Clause.

As to all plaintiffs I would dismiss so much of the claim as alleges a violation of the equal protection clause because of lack of standing to sue. However, in my view, the allegations of the complaint disclose a legislative scheme violative of the Establishment Clause of the First Amendment, as to which plaintiff Lemon alone shows standing to com-

plain. As to Lemon's First Amendment claim, the motion to dismiss should be denied.

WILLIAM H. HASTIE,

Chief Judge, Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island, *Appellants*,

and

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY, *Intervenor-Appellants*,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL, *Appellees*.

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

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JURISDICTIONAL STATEMENT

Intervenor-appellants appeal from the judgment of the United States District Court for the District of Rhode Island, entered on June 17, 1970, declaring a Rhode Island statute providing supplements to the

salaries of nonpublic school teachers unconstitutional under the First Amendment and permanently enjoining further implementation of the statute. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinions filed by the three-judge District Court for the District of Rhode Island have not yet been reported and are reprinted as Appendix A of this Jurisdictional Statement. Copies of the judgment entered by the District Court and of the notice of appeal filed with the District Court are reprinted as Appendices B and C.

JURISDICTION

This action, to enjoin the operation of a Rhode Island statute, was brought pursuant to 28 U.S.C. §§ 1331, 1343 and 2281 and was heard by a three-judge court under 28 U.S.C. § 2284. The judgment of the District Court was entered on June 17, 1970, and intervenor-appellants filed notice of appeal with the District Court on June 26, 1970. An application to stay the permanent injunction issued by the District Court was filed on June 26, 1970 with this Court and addressed to Mr. Justice Brennan, Circuit Justice for the First Circuit. The application was referred by Mr. Justice Brennan to the Court and, on June 27, 1970, the Court granted a stay of the District Court's order pending the timely filing of the appeal in this case.

The jurisdiction of this Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTION PRESENTED

The sole question presented by this appeal is whether the Rhode Island statute providing supplements to the salaries of nonpublic school teachers violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, because teachers in religiously affiliated schools are eligible for and receive benefits from the statute.

STATUTE INVOLVED

The Rhode Island statute challenged by appellees on First Amendment grounds is entitled "An Act Providing Salary Supplements to Nonpublic School Teachers," R.I. Gen. Laws chap. 16-51, and is hereinafter referred to as the Salary Supplement Act. The statute is reprinted as Appendix D to this Jurisdictional Statement.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Challenged Statute

Rhode Island's Salary Supplement Act, which became effective on July 1, 1969, appropriates state funds for the payment of a 15 per cent supplement to the salaries of eligible teachers in nonpublic elementary schools in the state. The statute was enacted pursuant to the long-standing "policy of the state of Rhode Island to provide a quality education for all Rhode Island youth"[1] and for the express purpose of permitting nonpublic elementary schools "to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." R.I. Gen. Laws § 16-51-1. An eligible teacher is defined both by reference to the school in which he or she teaches and to his or her individual qualifications.

The statute defines "a nonpublic school" as one which is not operated for profit, which is capable of permitting its students to fulfill the requirements of Rhode Island's compulsory school attendance law,[2] and which has an annual per pupil expenditure for secular edu-

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[1] That policy has its roots in the Rhode Island Constitution, which imposes on the state legislature "the duty . . . to promote public schools *and* to adopt all means . . . necessary and proper to secure to the people the advantages of education." R.I. Const. art. XII, § 1 (emphasis added).

[2] R.I. Gen. Laws § 16-19-2; see also R.I. Gen. Laws § 16-22-2.

cation that does not equal or exceed the average annual per pupil expenditure in the state's public schools. R.I. Gen. Laws § 16-51-2. A teacher in a nonpublic elementary school satisfying that definition will be eligible for the salary supplement if he or she meets the additional qualifications imposed by section 3 of the statute. Briefly stated, those additional requirements are that a teacher teach only those subjects which are required to be taught by state law or which are taught in public schools, that the teacher be certified by the State Department of Education, that the teacher's salary meet the minimum salary requirements of the state law for public school teachers, that the teacher use only teaching materials in use in the public schools, and that the teacher not teach a course in religion while receiving a salary supplement from the state. R.I. Gen. Laws § 16-51-3.

The statute also limits participation in its benefits to those teachers whose total salaries, including the 15 per cent supplement, do not exceed the average maximum salary paid to public school teachers in the state. R.I. Gen. Laws § 16-51-4. Participating teachers must apply directly to the Commissioner of Education for the supplement, R.I. Gen. Laws § 16-51-3; the supplement must be paid directly to the teacher and "not through the agency of the nonpublic school in which the teacher is employed." R.I. Gen. Laws § 16-51-5. The State Department of Education is authorized to audit the books of nonpublic schools to assure that participating teachers are being paid at least the prescribed minimum salary. R.I. Gen. Laws § 16-51-5. For the first year of the statute's operation, the Rhode Island General Assembly appropriated $375,000 to implement it.

B. The Proceedings Below

The appellees, six individuals asserting the status of state taxpayers, filed a complaint with the United States District Court for the District of Rhode Island on December 16, 1969, challenging the constitutionality of the Salary Supplement Act under the Establishment and Free Exercise Clauses of the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The essential constitutional defect alleged by the appellees was that the challenged statute "provides for direct financial aid out of state funds which support sectarian schools." Complaint, ¶ 20. The named defendants were the state officials responsible for implementing the statute. On February 11, 1970, the District Court granted a motion by seven teachers in Roman Catholic elementary schools, who had qualified for salary supplement payments, and two parents with children attending Roman Catholic elementary schools to intervene on behalf of the defendants.

A three-judge court was convened, as requested by the appellees in their complaint, and that court received evidence and heard arguments on March 18 and 19, 1970. The evidence consisted of several documents and depositions and the testimony of nine witnesses.[3] On June 15, 1970, after receiving post-trial briefs, the District Court filed its opinion holding that the Salary Supplement Act contravened the Establishment Clause

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[3] The witnesses who testified at trial were Edward F. Wilcox, who supervises the administration of the Salary Supplement Act; Rev. Edward W. K. Mullen, Superintendent of Schools for the Roman Catholic Diocese of Providence; and the seven teacher-intervenors. Appellees also placed in evidence the depositions of two other parochial school teachers who had qualified for salary supplement payments.

of the First Amendment. Judge Pettine entered a separate opinion, concurring in part and dissenting in part. On June 17, 1970, after denying applications for a stay of its injunction pending direct appeal to this Court, the District Court entered its judgment declaring the statute unconstitutional and permanently enjoining its operation. On June 26, 1970, an application was presented to Mr. Justice Brennan, Circuit Justice for the First Circuit, seeking a stay of the permanent injunction until this Court could consider and decide the appeal in this case. Mr. Justice Brennan referred the application to the entire Court and, on June 27, 1970, the Court granted the stay, with Mr. Justice Douglas dissenting and Mr. Justice White and Mr. Justice Marshall taking no part in the consideration of the application.

C. The District Court's Opinion

The District Court did not enter separate findings of fact and conclusions of law. Consequently, its opinion is the sole source of the facts it deemed relevant to the legal issues in the litigation.

The bulk of the evidence presented by the parties at trial reflected their differing views of the applicable legal principles. The appellees contend that the Establishment Clause bars all public financial assistance to religious or "sectarian" institutions, and their evidence emphasized the so-called religious "atmosphere" existing in church-related nonpublic schools which benefit from the Salary Supplement Act. The intervenor-appellants assert that the state can constitutionally subsidize the secular educational functions performed by church-related schools and emphasized in their evidence that teachers receiving salary supple-

ment payments were engaged in solely secular educational activities.[4] The facts recited in the District Court's opinion reflect those two divergent lines of evidence.

In enacting the Salary Supplement Act, the Rhode Island General Assembly found that 25 per cent of all elementary school children in the state attend nonpublic schools and that those schools, because of the rising costs of teachers' salaries, were having difficulty maintaining their educational quality. R.I. Gen. Laws § 16-51-1. The District Court found that the evidence presented at trial concerning Roman Catholic parochial elementary schools[5] fully corroborated those legislative findings. However, despite the legislature's concern for the financial difficulties faced by nonpublic schools, the District Court also found that the challenged statute would not relieve parishes which support parochial schools of their escalating financial burdens. Those parishes will continue to spend increasing amounts of their own funds in their quest for educational quality, and the Salary Supplement Act will simply permit parochial schools to obtain better qualified teachers.

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[4] Consistent with their view of the controlling constitutional principles, the intervenor-appellants objected to all evidence offered by the appellees to show a so-called "religious atmosphere" in parochial schools. The intervenor-appellants contended in the District Court that all such evidence is constitutionally irrelevant, a position they will continue to urge in this appeal.

[5] There are two explanations for the emphasis at trial and in the District Court's opinion on those nonpublic schools that are affiliated with the Roman Catholic Church. First, 95 per cent of all Rhode Island children enrolled in nonpublic schools attend Roman Catholic parochial schools. Secondly, to date, only teachers in Roman Catholic parochial schools have applied for benefits under the Salary Supplement Act.

The District Court noted that parochial schools "possess a number of distinctively religious attributes which distinguish them from public schools." App. A, p. 8a. Among those "religious attributes" are the proximity of parochial schools to the parish church, religious symbolism on and within the school building, classroom prayers, the teaching of religion as a part of the curriculum and certain other religiously oriented activities. The District Court also found a concern for religious values expressed in a Diocesan Handbook of School Regulations, which, subject to the requirements of state law and accreditation, provides general guidelines for parochial school principals. On the basis of those facts, the District Court concluded that the Roman Catholic Church "gains special advantage from a curriculum which contains both religious and secular subjects," App. A, p. 9a, and that "the diocesan school system is an integral part of the religious mission of the Catholic Church." App. A, p. 9a.[6]

The District Court also found, however, that the religious attributes of parochial schools and the concern of those schools for religious values "[do] not necessarily affect the content of secular subjects in diocesan schools." App. A, p. 8a. The District Court noted that all teachers who testified at trial stated that they did not inject religion into their secular courses and that "[t]his testimony gains added credibility

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[6] Strictly speaking, the conclusions quoted above from the District Court's opinion cannot be considered findings of fact, since no evidence was presented at trial to show why the Roman Catholic Church supports and maintains elementary schools or what role those schools play in the religious mission of the Roman Catholic Church. However, this Court has already indicated that those considerations are irrelevant to the question of whether the state can constitutionally spend its funds to aid the secular educational process in those schools. See *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970).

from the fact that several of the teachers were non-Catholics." App. A, p. 8a. The District Court also pointed out that teachers qualifying for salary supplements were required to use only those teaching materials that are approved for use in the public schools.

The District Court's review of the evidence concluded with the following statement:

> "These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise." App. A, p. 10a.

The District Court began its Establishment Clause analysis by purporting to apply the "purpose and primary effect" test first articulated by this Court in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963), and subsequently applied to the issue of public financial assistance to church-related education in *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968).[7]

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[7] The District Court quickly and correctly disposed of two legal arguments made by the appellees. First, the District Court ruled that the appellees' separate claim based on the Free Exercise Clause of the First Amendment failed for lack of proof. App. A, p. 11a. Secondly, the District Court rejected the appellees' Establishment Clause argument based on the following language from *Everson* v. *Board of Education,* 330 U.S. 1, 15-16 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Appellees contended that language imposed an absolute prohibition on all public aid to religious institutions. The District Court properly noted that any such reading of *Everson* was belied by its holding. See also *Walz* v. *Tax Commission,* 397 U.S. 664, 670-71 (1970).

This Court formulated that test in this manner:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S. at 243.

The District Court had little trouble holding that, in light of the Salary Supplement Act's express statement of purpose, R.I. Gen. Laws § 16-51-1, the challenged statute had the requisite secular purpose. However, the primary secular effect requirement of the *Allen* test caused the District Court greater problems.

Having found that the Salary Supplement Act had produced two significant effects, one clearly secular and the other characterized as religious, the District Court declined to engage in further analysis to determine which effect should be considered "primary" within the meaning of the *Allen* test.[8] Rather, the District Court read this Court's recent decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), as refining the *Allen* test of primary effect and directing the inquiry to whether the challenged spending program

[8] In so ruling, the District Court specifically rejected the intervenor-appellants' argument that the *Allen* decision requires that the primary effect be measured by reference to the educational function being subsidized by the public funds. Under that analysis, a challenged statute will have the necessary primary secular effect if funds appropriated under the statute support only the secular educational functions of religiously affiliated schools. A three-judge district court in Connecticut applied that precise test in sustaining the constitutionality of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58, in the face of an Establishment Clause challenge. *Tilton* v. *Richardson,* No. 153, October Term, 1970.

results in "excessive entanglements" between the government and religious institutions. The District Court concluded that the Salary Supplement Act produced such excessive entanglements and therefore had an effect proscribed by the Establishment Clause. The District Court also expressed concern that efforts by church-related schools to qualify their teachers for salary supplement payments could limit the internal freedom of those schools to order their curricula.

In a separate opinion, Judge Pettine concurred with the majority's conclusion that the Salary Supplement Act would lead to excessive entanglement between government and religion. But he dissented from the majority's ruling that the statute had the effect of providing substantial support to a religious enterprise. Relying specifically on this Court's recognition in *Allen* that parochial schools perform the distinct functions of secular education and religious instruction, 392 U.S. at 245-48, Judge Pettine asserted that state support for the secular educational functions of parochial schools cannot be considered support for a religious enterprise unless there is proof that the secular teaching in those schools is permeated by religion. Judge Pettine found absolutely no proof of permeation in the record of this case.[9]

THE QUESTIONS ARE SUBSTANTIAL

1. The core constitutional question presented by this appeal is whether the Establishment Clause prohibits a state from seeking to improve the quality of secular education provided to a significant number of students

[9] Even the majority found no proof of such permeation. At most, the majority found a religious atmosphere existing in Rhode Island parochial schools. But it also was careful to point out that the so-called religious atmosphere did not affect the teaching of secular subjects in those schools. App. A, pp. 8a, 9a.

by religiously affiliated nonpublic schools. A similar constitutional question is already before this Court in two cases set for argument. In *Lemon* v. *Kurtzman*, No. 89, October Term, 1970, the appellants challenge on Establishment Clause grounds a Pennsylvania statute providing public funds to reimburse nonpublic elementary and secondary schools, including those with religious affiliations, for the cost of "secular educational services" provided in certain specified subjects. In *Tilton* v. *Richardson*, No. 153, October Term, 1970, a federal program of grants to public and private institutions of higher education, including those that are church-related, for the construction of academic facilities has been attacked on Establishment Clause grounds. In contrast to this case, the lower courts in both *Lemon* and *Tilton* found no merit in the Establishment Clause claims.

This Court's decision to hear the *Lemon* and *Tilton* cases indicates that it is ready to provide some needed clarification and guidance on the limitations the Establishment Clause imposes on government power to render financial assistance to church-related education. However, the aid program challenged in this case differs in several important respects from the programs attacked in *Lemon* and *Tilton*. For example, the public assistance provided by the Salary Supplement Act is paid directly to the teachers of secular subjects in nonpublic schools in Rhode Island, whereas the public funds at issue in the *Lemon* and *Tilton* cases are paid to church-related educational institutions.[10] In addi-

[10] It is quite probable that this Court will decide ultimately that such distinctions in the recipient of the public funds is without constitutional significance. However, in two prior decisions on this constitutional question, this Court has observed that, under the aid programs in question, no public funds went to church-related schools. *Board of Education* v. *Allen*, 392 U.S. 236, 243-44 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

tion, although both this case and the *Lemon* case involve aid to lower levels of education, this case reaches the Court in a different procedural posture than the *Lemon* case. For these reasons, a decision in the *Lemon* and *Tilton* cases will not necessarily decide the constitutional question presented by this appeal. In addition, because of the differences between this case and the *Lemon* and *Tilton* cases, this Court's consideration of the constitutional questions presented by all three cases will gain an added dimension if this case is set for argument.

2. Apart from the fact that arguments will be heard this Term in the *Lemon* and *Tilton* cases, this appeal presents important and substantial questions concerning the scope and application of this Court's prior Establishment Clause decisions. The most serious questions raised by the District Court's opinion are its interpretation of the decision in *Board of Education* v. *Allen, supra,* and its efforts to reconcile *Allen* with the more recent decision in *Walz* v. *Tax Commission, supra.*

The *Allen* decision sustained, in the face of an Establishment Clause challenge, a New York statute which made free textbooks available to students in grades seven through twelve of public and private schools, including those with religious affiliations. That holding was predicated on the purpose and primary effect test first enunciated in *Abington School Dist.* v. *Schempp, supra.* In the course of the *Allen* opinion, the Court expressly acknowledged that "religious schools pursue two goals, religious instruction and secular education." 392 U.S. at 245; see also *id.* at 247-48. The New York textbook program was upheld because the challenged statute authorized local school boards to distribute only secular textbooks. See 392 U.S. at 244-45. In addi-

tion, although the *Allen* opinion does not recite any facts concerning the religious atmosphere or activities of parochial schools benefiting from the textbook program, it can be safely assumed that those schools did not differ markedly in their religious attributes from Rhode Island parochial schools.

The *Allen* decision, therefore, makes the secular-religious dichotomy in the curricula of parochial schools the focus for analyzing the primary effect of a statute challenged on Establishment Clause grounds. Such a statute will have the requisite primary secular effect if it subsidizes only the secular educational process in those schools. The District Court, however, summarily rejected that test of primary effect, labeling it as too "narrow" in its perspective and "unrealistic." App. A, p. 14a.[11] The District Court viewed the proven secular benefits of the Salary Supplement Act to be no more significant constitutionally than the fact that a "religious enterprise" benefited from the statute. But the *Allen* decision makes clear that the incidental benefits realized by religiously affiliated schools from challenged expenditures are constitutionally irrelevant if the statute produces the necessary primary secular effect. See also *McGowan* v. *Maryland*, 366 U.S. 420, 442-45 (1961).

The District Court also misconstrued the *Allen* decision when it declined to analyze the several effects produced by the Salary Supplement Act to determine which was "primary" for Establishment Clause pur-

[11] It is interesting to note that the District Court dismissed the *Allen* test of primary effect as "unrealistic" when "direct financial aid to denominational schools is at issue." App. A, p. 14a. The District Court apparently forgot that no such "direct" aid is involved in this case. The state funds at issue go directly to eligible nonpublic school teachers and not to the schools.

poses. See App. A, pp. 13a-14a. Any constitutional test predicated on the existence of a primary effect necessarily presupposes that the statute in question has generated several effects. It is the task of courts applying that test to analyze those several effects in light of the principles laid down in *Allen* and to identify the one effect which is primary for Establishment Clause purposes. The District Court, however, described as "significant" two of the effects generated by the Salary Supplement Act and then concluded that no useful purpose would be served by engaging in further analysis to determine which of those two effects was primary. As a consequence, the District Court substituted the label "significant" for constitutional analysis and abdicated the judicial function imposed on it by the *Allen* decision. Indeed, a careful reading of the District Court's primary effect analysis, App. A, pp. 13a-16a, indicates quite clearly that the lower court completely disregarded the purpose and primary effect test prescribed by this Court only two years ago in *Allen* for measuring the constitutional validity of public aid to church-related education.

Finally, the District Court's effort to reconcile the *Allen* test with the recent decision in *Walz* v. *Tax Commission, supra,* raises substantial questions that only this Court can resolve. There can be no disputing the fact that the *Walz* decision is a landmark in the judicial development of Establishment Clause doctrine. However, it is equally clear that the District Court applied the *Walz* decision in a manner that emasculated the *Allen* test.[12]

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[12] The *Walz* case was decided by this Court exactly four weeks after the parties to this appeal filed their post-trial briefs with the District Court. The District Court decided this case exactly six weeks after *Walz* was decided without giving the parties an opportunity to brief or argue the relevance of *Walz* to this case.

The District Court's ruling that the Salary Supplement Act resulted in impermissible entanglements between government and religion was based in large part on the statute's regulatory scheme and the "ongoing administrative relationship between government and Catholic schools" created by that regulatory scheme. App. A, pp. 16a-17a. The District Court stressed in particular that, in determining whether a nonpublic school had the requisite per pupil expenditures for secular education, the Commissioner of Education might have to distinguish between spending for religious education and spending for secular education in those schools. However, an examination of the operation of the salary supplement program refutes the District Court's conclusion that excessive "entanglements" are a necessary effect of the statute. For example, during the first year of the statute's operation, no investigation of a nonpublic school's expenditures for secular and religious education was necessary, and the District Court recognized that, for the great majority of nonpublic schools benefiting from the statute, no such investigation would ever be necessary. App. A, p. 5a, n. 6.

A more serious consequence of the District Court's application of *Walz* is its suggestion that the mere existence of an administrative relationship between a governmental agency and a religiously affiliated school will invalidate a public aid program. The authority of state officials under the Salary Supplement Act is limited to assuring that the legislature's secular purpose will be implemented. Since *Allen* permits the state to subsidize the secular educational functions performed by parochial schools, it is wholly anomalous to hold that a regulatory scheme carefully tailored to

assure that proper use of public funds renders the aid program unconstitutional within the meaning of the *Walz* decision. Yet the District Court has reached just such an anomalous result in this case.

CONCLUSION

The federal questions presented by this appeal are substantial and are directly relevant to the constitutional questions presented by the appeals in *Lemon* v. *Kurtzman, supra,* and *Tilton* v. *Richardson, supra.* It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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August, 1970

APPENDIX

APPENDIX A

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs,*

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants,*

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants.*

Opinion

June 15, 1970

Before FRANK M. COFFIN, *Circuit Judge:* RAYMOND J. PETTINE, *District Judge—Rhode Island:* HUGH H. BOWNES, *District Judge—New Hampshire.*

COFFIN, Circuit Judge. Rhode Island's Salary Supplement Act, R. I. Public Laws c. 246 (1969), provides for the payment of state funds to teachers of secular subjects in non-public elementary schools. At present the sole beneficiaries of this statute are teachers in Roman Catholic schools. This suit seeks a declaration that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and an injunction against its continued operation.

Plaintiffs are citizens and taxpayers of the state of Rhode Island. The named defendants include Rhode Island's Commissioner of Education, the state Treasurer, and the state Controller, all of whom are involved in the administration of the Act. In addition, a couple with children in parochial schools and several teachers eligible for aid under the statute have been permitted to intervene

under Rule 24(b), Fed. R. Civ. P. Jurisdiction is based on 28 U.S.C. § 1343(3). Since the complaint seeks to enjoin a state law as repugnant to the Constitution, this three-judge court has been convened pursuant to 28 U.S.C. §§ 2281, 2284.

The complaint alleges in substance that Catholic schools are the primary beneficiaries of the Act, that the goal of these schools is the propagation of the Catholic faith, and that the statute therefore has as its purpose and primary effect the advancement of religion. Plaintiffs also claim that the statute constitutes compulsory taxation in aid of religion and thus violates the Free Exercise Clause. In their answers, defendants and defendant-intervenors have stressed that the Act aids teachers, not schools, and have denied plaintiffs' conclusion concerning the purpose and effect of the Act. Defendant-intervenors have also alleged that the injunctive relief sought by plaintiffs would infringe the free exercise of religion of those whose children attend parochial schools.[1]

The case is now before us for final decision on the merits of plaintiffs' and intervenors' constitutional claims. We have held a hearing, at which we received depositions and

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[1] Defendants also filed a motion to dismiss on the grounds that plaintiffs lacked standing. This objection we find to be without merit. The standing of taxpayers to challenge state expenditures which infringe the Establishment Clause has long been settled. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). The more recent two step analysis suggested in *Association of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150 (1970), produces the same result. Plaintiffs allege that their tax dollars are being misspent, thus establishing injury in fact. It is also clear that the Establishment Clause was intended to limit the use of public funds in support of religious institutions. *Flast* v. *Cohen*, 392 U.S. 83, 103-104 (1968); *see Everson* v. *Board of Education*, 330 U.S. 1, 11-13 (1947). Thus the interest asserted by plaintiffs is within the zone protected by the First Amendment. *Accord*, *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (E.D. Pa., 1969), *prob. juris. noted*, 38 U.S.L.W. 3401 (U.S. April 21, 1970).

documentary evidence, and heard testimony from the Superintendent of Schools for the Archdiocese of Providence, an Associate Commissioner of Education for the state of Rhode Island, and several teachers eligible for aid under the statute. On the basis of this record, we make the following findings of fact and reach the following conclusions of law in compliance with Rule 52(a), Fed. R. Civ. P.[2]

I. *Findings of Fact*

A. *The Statutory Scheme*

The Salary Supplement Act opens with a statement that its general purpose is to implement the established state policy of providing "a quality education for all Rhode Island youth".[3] This declaration is followed by specific legislative findings: that non-public elementary schools enroll 45,000 students, or 25 per cent of Rhode Island's elementary school children; that because of the numbers enrolled, these schools are vital to Rhode Island's educational effort; and that the rising cost of teachers' salaries makes it increasingly difficult for these schools to maintain their traditional quality. The specific purpose of the Act is, in the language of the statute, "to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." To accomplish this objective, the

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[2] In making these findings, we have taken into consideration the evidentiary objections of defendants and intervenors. We have declined to consider evidence concerning the activities of proponents of the Salary Supplement Act for reasons discussed *infra* p. 15 and have also ignored sociological evidence introduced in plaintiffs' post-trial memorandum. We reject, however, intervenors' view that the only relevant evidence concerned the activity subsidized, i.e., secular teaching in parochial schools. Such a narrow view of relevance in effect prejudges the central legal issues of the case.

[3] *Compare* R. I. Const. Art. XII, § 1; R. I. Gen. Laws § 16-7-15 (Supp. 1967).

legislature appropriated $375,000 to pay up to 15 per cent of the salaries of teachers of secular subjects in non-public elementary schools. The Act defines "non-public" school to mean a non-profit school whose average per pupil expenditure on secular education does not exceed the average for the state's public schools during a specified period. To qualify for aid, a teacher must have a teaching certificate, must teach a course similar to those offered in Rhode Island's public schools using text books approved for public school use,[4] and must agree not to teach a class in religion.

Regulations implementing the Act call for semi-annual payments to eligible teachers in February and June.[5] Applicants must sign a "Statement of Eligibility" promising not to teach a course in religion and to use only teaching materials employed in the state's public schools. The Commissioner of Education also requires non-public schools to submit data concerning enrollments and total expenditures. If this data indicates a per-pupil expenditure in excess of the statutory norm, an agent of the Commissioner must examine the books of the school in question in order to determine how much of its spending was attributable to secular education and how much to religious.

To date, this final breakdown into secular and religious expenses has proved necessary in only one case. Only two non-public schools have reported expenditures in excess

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[4] *See* R. I. Gen. Laws §§ 16-23-2 and 16-1-9 (Supp. 1967), which authorize local school committees to furnish parochial school children with any mathematics, science or foreign language textbook which appears on the Commissioner of Education's list of books approved for public school use.

[5] The first payment scheduled for February 1970 was delayed by a temporary restraining order entered by the single judge to whom the complaint was originally submitted. The restraining order was allowed to lapse by agreement of the parties, and plaintiffs have waived their prayer for a preliminary injunction.

of the statutory norm, and teachers at one of these schools failed to apply for aid, thus obviating the need for further inquiry.[6] Approximately 250 teachers have applied for aid. It is undisputed that all of these applicants are employed by Roman Catholic schools.

B. *Nature of the Crisis Leading to the Statute*

The evidence introduced at trial fully corroborates the legislature's finding of a financial crisis in non-public education, but indicates that the crisis is largely confined to Rhode Island's Catholic schools. Approximately 95 per cent of the elementary school children attending non-public schools are enrolled in Roman Catholic elementary schools. The financial crisis in these schools stems from the rapidly changing composition of their faculties. As recently as ten years ago, the Archdiocese of Providence relied almost exclusively on nuns to staff its school system. Lay teachers filled only 4 or 5 per cent of the system's 1200 teaching positions. By 1969, lay teachers constituted one third of the teaching force. In the academic year 1970-1971, the great majority of parishes will require at least one additional lay teacher, with some needing two or three more. This precipitous increase in lay personnel—an increase which is expected to continue—has placed a double burden on the parish budgets which finance almost all of the 98 elementary schools. Each shift from a teaching sister to a lay teacher represents a threefold increase in salary expense (i.e., a shift from approximately $1800 to $5500 at present levels). Moreover, the increasing salary levels in public schools make the task of recruiting lay teachers annually more expensive.

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[6] It is worthy of note that these schools were the only non-Catholic schools to report their expenditures to the Commissioner. As long as Catholic schools rely heavily on nuns, their wage costs are likely to remain substantially below those of public schools, *see infra* p. 6, thus obviating the need to break down expenditures.

The Salary Supplement Act will not relieve the parishes or parents of their escalating burden, but will temporarily enable parochial schools to compete for qualified teachers. A comparison of past and predicted salary levels confirms the limited impact of the statute. In 1968-1969, a starting lay salary in the parochial schools was $5000 a year. In 1969-1970 the diocesan school system offered $6000, hoping that 15 per cent of this amount, or $900, would be paid by the state under the Supplement Act. In the meantime, however, the standard beginning salary for public elementary school teachers in Providence and elsewhere has increased from $6000 to $7000. Even assuming, as does the Superintendent of the diocesan school system, that the parochial schools can compete effectively for teachers if they come within $500 of public school salaries, the diocese must offer a starting salary of $6500 in 1970, of which $975 would be paid by the state and $5525 would be paid by the parish—an increase of ten per cent over the $5000 parish expenditure pre-1969.

The financial implications for both the parishes and the state are clear. Even to continue to subsidize the salaries of the present teacher-recipients at the present percentage figure will cost both the state and the parishes substantially more during the coming school years. But already the Superintendent of the diocesan school system has informed elementary school principles that he expects the present ratio of two sisters to one lay teacher to give way to a one to one ratio in the near future. Moreover, the Superintendent acknowledged at trial that almost all of the teaching staff might be lay persons within five years. Since, as we have seen, the substitution of a lay for a religious teacher means, even at present rates, a threefold increase in salary cost, it is obvious not only that the parochial schools face a monumental and deepening financial crisis but also that the objective and rationale of the Salary Supplement Act—to enable non-public schools to compete effectively for qualified teachers—will inescapably require

substantially greater appropriations subsidizing substantially greater percentages of the salaries of lay teachers.

C. The Parochial School System

At trial, the parties went beyond the immediate financial crisis in parochial schools to explore the operations of the diocesan school system as a whole. Plaintiffs' evidence was designed to show the close financial and pedagogical nexus between Church and school. Intervenors' testimony explored the teaching of secular subjects in these schools. From this evidence, the following picture emerges.

Rhode Island's Catholic elementary schools are under the general supervision of the Bishop of Providence, and of his appointed representative, the Diocesan Superintendent of Schools. The financing of these schools varies: in some, substantial tuition is charged covering up to 40 per cent of school costs; others charge only a nominal fee and rely on general parish revenues to make up the balance. In most cases, however, the parish assumes the ultimate financial responsibility for the school, and the pastor assumes the ultimate responsibility for the allocation of parish funds. School principals are, with two exceptions, nuns appointed either by the Superintendent or by the Mother Provincial of the order staffing the school. Lay teachers are first interviewed by the Superintendent's office, then by the school principal, with the contract being signed by the pastor of the parish. The Diocese sets minimum salary standards for both lay teachers and nuns, but some discretion is left to the individual pastor in negotiating actual salary levels.

The ground rules for school principals are set forth in a "Handbook of School Regulations", having "the force of synodal law in the diocese." The impression of tidy central management which the Handbook conveys was somewhat dispelled at trial when the Superintendent testified that the Handbook had been frequently superseded either by in-

formal directive or by common practice. Testimony also indicated that individual principals, whether by design or oversight, felt free to make minor modifications in diocesan programs to fit the particular needs of the school.

The main thrust of the Handbook, however, remains clear. The keynote of education in a parochial school is perhaps best reflected in the Handbook's remarks about the importance of a teacher: "The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher. . . ." Consistent with this view is the Handbook's view of the scope of religious activities: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Teachers are further advised by the Handbook to try to stimulate interest in pursuing religious vocations and in missionary work.

This concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school. This testimony gains added credibility from the fact that several of the teachers were non-Catholics. Moreover, because of the restrictions of Rhode Island's textbook loan law, R.I. Gen Laws §§ 16-23-2, 16-1-9 (Supp. 1967), and the explicit requirement of the Salary Supplement Act, teaching materials used by applicants for aid must be approved for use in the public schools.

Nevertheless, the diocesan schools do possess a number of distinctively religious attributes which distinguish them from public schools. Each parochial school is in close proximity to the parish church, allowing a convenient access for Mass or other religious exercises. The exterior of the school often has an identifying cross; each classroom contains a crucifix and school interiors generally exhibit re-

ligious paintings and statuary. Classes each day begin with a prayer; some schools schedule additional times for prayer. Roughly thirty minutes a day or one hundred fifty minutes a week are devoted to religious instruction. Assembly programs sometimes include a speaker on religious vocations or missionary activity, and some extra-curricular activities, such as altar or choir boy training and missions programs, are religiously oriented. Students and faculty participate in a yearly retreat and all teachers participate in a two day annual meeting of the Catholic Teachers Institute in which the teaching of religion is occasionally discussed. Occasional guidance counselling, including religious counselling, takes place at the elementary level.

In addition to these factors, the Church gains special advantage from a curriculum which contains both religious and secular subjects. When religion is part of the school day, children can be instructed in their faith more frequently, with less absenteeism, and with greater attention to the religious development of each child. Moreover, religious instruction can be staggered throughout the day to utilize more effectively the limited number of qualified teachers of religion. Finally, we note that the presence of dedicated sisters, though diminishing in numbers, provides an atmosphere where religious instruction and religious vocations seem natural parts of everyday life. Indeed, concern for this intangible "religious atmosphere" has led the Superintendent to decide tentatively to attempt to maintain a one sister to one lay teacher ratio in most of the diocesan schools rather than permitting some to be staffed predominately by lay teachers. To go below this norm would, the Superintendent feared, dilute the Catholic atmosphere of the parochial schools.

Implicit in these findings, we think, is the further finding that the diocesan school system is an integral part of the religious mission of the Catholic Church. It is not that religious doctrine overtly intrudes into all instruction.

Rather the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation. It also seems clear to us that this essentially religious enterprise cannot succeed without good teaching in secular subjects. If the quality of teaching falls too low, then not only will Catholic parents be reluctant to enroll their children, but the parochial schools would also run afoul of Rhode Island's education laws.[7] Good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms.

These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise.

II. *Conclusions of Law*

A. *Plaintiffs' First Amendment Claims*

With these findings in mind, we turn to the central legal issue of the case, whether Rhode Island's Salary Supplement Act violates the First Amendment's provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", as applied to the states through the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Everson* v. *Board of Education*, *supra* n. 1.

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[7] R. I. Gen. Laws § 16-19-2 sets standards for private schools and requires them to obtain the approval of the local school committee to satisfy compulsory attendance laws. *See also* R. I. Gen. Laws § 16-22-2.

Plaintiffs' free exercise claim need not long detain us. In their complaint, plaintiffs alleged that the statute infringed on the free exercise of their religion by forcing them to pay taxes for religious purposes. But plaintiffs offered no testimony concerning their personal religious beliefs and practices, or lack thereof. Thus they have failed to introduce the kind of particularized evidence necessary "to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963).

The heart of plaintiffs' case lies in their claim that the Act violates the Establishment Clause. Much of the dispute at trial centered on the appropriate standard for gauging this claim. As of the date of argument in this case, there were three dominant precedents from which the parties drew sustenance. The first was *Everson*, in which the Court upheld a New Jersey statute which permitted reimbursement to parents for bus fares of children attending both public and parochial schools. The second was *Schempp*, proscribing prayers in public schools. The third was *Board of Education* v. *Allen*, 392 U.S. 236 (1968), which upheld a New York law requiring local school boards to loan textbooks to children attending parochial schools.

Plaintiffs have mounted a preliminary attack based on a statement in *Everson* that, "No tax in any amount, large or small, can be levied to support any religious activities or institutions." 330 U.S. at 16. Since the Act appropriates tax monies for employees of religious institutions, plaintiffs maintain, it is clearly unconstitutional. Whatever the continued vitality of the *Everson* test, however, we are satisfied that it cannot be applied in such a literal manner. Although in both *Everson* and *Allen*, tax funds were used to support religious institutions, in both the aid was sustained. Plaintiffs distinguish these cases on the grounds that the cost of bus fares in *Everson* and textbooks in *Allen* was originally borne by the parents rather than the schools.

But assuming that state subsidies of buses or books otherwise pass constitutional muster, we find it difficult to believe that these laws would fail because prior to enactment parents bore the costs indirectly, in the form of higher school bills, rather than directly. *Accord, Lemon* v. *Kurtzman*, 310 F. Supp. at 47-48; *Tilton* v. *Finch*, — F. Supp. — (slip opinion at 11-12) (D. Conn. March 19, 1970).

Perhaps recognizing the shortcomings of the *Everson* formulation, both plaintiffs and defendants have focused their argument on the purpose and effect test relied on in *Allen*, 392 U.S. at 243, and first enunciated in *Schempp*:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ." 373 U.S. at 222.

The first part of this test—determining the statute's purpose—presents little difficulty. The Salary Supplement Act, in our opinion, was not intended to advance or interfere with religion. The statute itself recites that its purpose is "to provide a quality education for all Rhode Island youth, those in public and non-public schools alike." Certainly, the quality of education in non-public schools is a legitimate legislative concern. *Board of Education* v. *Allen*, 392 U.S. at 245-247. We find nothing in the history and structure of the Act which suggests that the legislative purpose was other than as declared.

In reaching this result, we necessarily reject plaintiffs' attempt to divine the "true intent" of the legislature by inspecting the activities of lobbyists. As Mr. Justice Frankfurter observed in *McGowan* v. *Maryland*, 366 U.S. 420, 469

(1961), "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing." *See United States* v. *O'Brien*, 391 U.S. 367, 383-385 (1968). Nor do we think that the legislature revealed a forbidden motive when it stated that the proposed legislation was designed "to assist non-public *schools* to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." (Emphasis added.) Phrasing the test in terms of schools instead of students does not, we think, obscure the legislature's legitimate concern for the quality of education afforded to Rhode Island youth. Finally, while the restriction of aid to schools whose per pupil expenditure does not exceed that of the public schools may result in excluding, for the most part, private but non-parochial schools from the scope of the statute, this provision also serves the legitimate secular purpose of saving state funds by eliminating schools which can well afford qualified teachers.[8]

The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "*the* primary effect", as *Schempp* seems to require, are likely to be no more satis-

[8] This aspect of the statute comes close to being a "religious gerrymander". Harlan, J. concurring in *Walz* v. *Tax Commission*, 38 U.S.L.W. at 4356. Nevertheless, the standard chosen is religiously neutral and almost any criteria based on financial need would produce the same result.

factory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities.[9] Equally important, government aid to purely secular activity may nevertheless involve the state so deeply in the workings of religious institutions "as to give rise to divisive influences and inhibitions of freedom." *Abington School District* v. *Schempp,* 374 U.S. at 307 (Goldberg, J. concurring). Such embroilments would escape the narrow focus of intervenors' test.

These deficiencies in the *Schempp* test were, we think, recognized in the recent case of *Walz* v. *Tax Commission of New York City,* 38 U.S.L.W. 4347 (U.S. May 4, 1970),

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[9] Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. Finally, we do not intend our reference to "sophisticated bookkeeping" to imply only sham allocations of expenditures; an accounting system might honestly allocate only a small portion of the total costs of a parochial school to the religious function.

upholding New York's tax exemption for property used for religious purposes. The test as phrased by Chief Justice Burger is still two pronged:

> "Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." 38 U.S.L.W. at 4348.

The Chief Justice's phrasing and application of the effect test, however, mark a significant refinement. Gone are the intimations of *Schempp* that the single predominant effect of a statute may be isolated by a process of deductive reasoning based on principle and precedent.[10] Instead, the Court focuses on whether the statute fosters "exclusive entanglement" between government and religious institutions. Such entanglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinently, in discussing the alternatives of taxing or exempting church property, the Chief Justice observes:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." 38 U.S.L.W. at 4350.

Walz thus makes it clear that the test of a statute's effect is not whether the secular result is more important than

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[10] Indeed, we note that neither the majority nor the concurring opinions rely on the *Schempp* formulation.

the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards.

When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions involved in *Walz*, must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of "secular" education such as Rhode Island already provides its public schools.[11]

On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suit-

[11] Rhode Island once provided a flat grant for public school teachers' salaries, R. I. Gen. Laws § 16-6-3 *et seq.* (1956), but this system has now been replaced by a percentage subsidy of the cost of education. R. I. Gen. Laws § 16-7-15 *et seq.* (Supp. 1967).

able for public school use. *Compare* R. I. Gen. Laws § 16-1-9 (Supp. 1967).[12] Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This ongoing administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church,* 393 U.S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen,* 392 U.S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman,* 310 F. Supp. at 52, private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same stand-

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[12] *But see* Note, *Sectarian Books, the Supreme Court and the Establishment Clause,* 79 Yale L. J. 111 (1969), which reviews the contents of the books actually supplied under the New York law and concludes that many were infused with a sectarian viewpoint.

ards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296 (1966).[13] Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), and in the hiring and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969).[14] At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that

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[13] We note the increasing resort to the federal courts to rectify alleged wrongs committed by school authorities acting under the color of state law. *E.g., Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) (peaceful protest by high school students); *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (procedural due process for students); *Richards* v. *Thurston*, — F.2d — (1st Cir. April 28, 1970) (length of student's hair).

[14] The regulations of Rhode Island's Commissioner of Education require schools whose teachers apply for aid to comply with Title VI of the Civil Rights Act of 1964, surely the minimum we may expect of any organization receiving significant public support. More difficult problems loom down the road. For example, one pastor deposed that he would refuse to hire a teacher who had been divorced and remarried. The religious discrimination which sectarian schools must of necessity practice may also be used to cloak other, less desirable forms of discrimination. *See, e.g.*, W. Morris, *Yazoo . . . Notes on Survival*, Harper's Magazine 43, 53 (June, 1970). Whatever their solution, these problems indicate that we would have to rethink much of our law, especially the law of equal protection, in order to accommodate an institution which receives significant state aid and yet discriminates on principle.

the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment.[15] *Accord, Opinion of the Justices,* 261 A.2d 58 (Me. Jan. 15, 1970).

B. *Intervenors' First Amendment and Equal Protection Claims*

There remains for our consideration the equal protection claim of the teacher-intervenors and the free exercise claim of the parent-intervenors. The equal protection claim is the more elusive of the two. Teacher-intervenors apparently assume a Salary Supplement Act restricted by judicial decree to aiding teachers in non-public but secular schools. Such a statutory scheme, intervenors argue, would violate equal protection because it discriminates among teachers of secular subjects on an impermissible ground—i.e., religion. Their argument remains somewhat hypothetical since, as we have seen, the only applicants for aid have been parochial school teachers. Intervenors are, in other words, complaining of the abstract possibility of discrimination rather than the thing itself. Moreover, intervenors' hypothetical scheme would not discriminate on the basis of the teachers' personal beliefs—surely a suspect classification—but on the basis of the institutions which employ them. This distinction between secular institutions which are eligible for subsidy and religious institutions which are not seems to us commanded by the Establishment Clause. Thus,

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[15] While we conclude that Rhode Island's statute is unconstitutional, we do not wish to be read as condemning aid in any form to institutions affiliated with religion. We do not, for example, disagree with the result in *Tilton* v. *Finch, supra,* which upheld a federal enactment subsidizing secular facilities at private colleges, including church-related colleges. The degree of institutional involvement required by the federal program was episodic and relatively slight. Moreover, denominational colleges do not have the same close financial, legal, and pedagogical relationship to the Church as do parochial schools.

even though religion in general may be a suspect classification, the mandate of the Establishment Clause provides an overriding justification in this case. *Cf. Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

The parent-intervenors present a more plausible claim, based on the Free Exercise Clause. Their complaint rests on the conviction that children take their values to a large extent from their school environment; a school without religion conveys to the child the notion that religion is unimportant. Because of this conviction, parent-intervenors feel in conscience bound to send their children to parochial schools which teach both secular subjects and religion. If, however, the quality of secular education falls too low in parochial schools, parent-intervenors may well be forced to ignore the dictates of conscience by sending their children to public schools. To avoid this result, intervenors argue that the free exercise benefits which flow from aid to parochial education should prevail over the Establishment Clause values protected by strict separation, citing in support of their argument *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

While sympathetic to intervenors' dilemma, we note that it stems primarily from their personal evaluation of public school education. We reject the notion that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated. *See* Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1686-1687 (1969). Certainly it would be anomalous if the First Amendment required the state to exclude religion from the public schools but at the same time to support an entire separate school system in order to facilitate the teaching of religion. Such a result is not compelled by *Sherbert* v. *Verner*, *supra*, which required a minor change in a welfare program to

accommodate sabbatarians. The Court was careful to note that such minor accommodation did not entail the kind of involvement of religious and secular institutions forbidden by the Establishment Clause. 374 U.S. at 409. The Court also noted that some burdens on the free exercise of religion could be justified by a compelling state interest requiring uniformity of regulation. 374 U.S. at 406-409. Our case falls within both these exceptions. Not only does the Salary Supplement Act embroil religious and secular institutions, but the Establishment Clause values can be preserved only by denial of direct subsidies to parochial schools. We therefore reject the free exercise claim of parent-intervenors.

III. *Conclusion*

Plaintiffs are entitled to a declaratory judgment that R. I. Public Laws c. 246 (1969) violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools, and to an injunction forbidding defendants and their agents from making disbursements to such teachers.

FRANK M. COFFIN
Frank M. Coffin
U. S. Circuit Judge

HUGH H. BOWNES
Hugh H. Bownes
U. S. District Judge

Dated at Providence, Rhode Island 15th day of June 1970

PETTINE, District Judge—concurring in result, concurring in part and dissenting in part with the Opinion of the Court.

The majority decision holds the Salary Supplement Act unconstitutional for two reasons: (1) its effect is substantially to support a religious enterprise; (2) its operation involves those "reciprocal embroilments of government and religion which the First Amendment was meant to avoid." I concur in the holding of unconstitutionality for the latter reason. However, my disagreement with the former reason requires my separate concurrence.

The Salary Supplement Act does not substantially support a religious enterprise; rather it supports a most important facet of the educational process in modern America, the teaching of all that knowledge presently appropriate for learning, exclusive of religion. That a distinction between the teaching of religion and non-religious subject matter in sectarian schools may be maintained for Establishment Clause purposes seems clear to me from the decision of the Supreme Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). I read *Allen* to invite the inquiry whether the state program under scrutiny has as its effect the advancement of a religion. In answering that inquiry it cannot be presumed that secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment. Only proof will establish that subsidization of an educational enterprise is subsidization of a "religious enterprise." In the instant case not only is the record barren of any proof that the teaching of secular subject matter is a "religious enterprise," but also there is unanimous unrebutted testimony from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes.

I cannot accept the majority's proposal that exclusive focus on the educational function sought to be subsidized is

too narrow a standard because "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." Such reasoning equates the legal and bookkeeping definitions of "secular" and "religious." The law is equipped to distinguish bookkeeping entries from legally distinct entities. The secular-religious distinction is fundamental; it will take more than accounting machinations to elude it.

The majority's rejection of the plaintiffs' heavy reliance on the principle stated in *Everson* v. *Board of Education*, 330 U.S. 1 at 16 (1947) that "(n)o tax in any amount, large or small, can be levied to support any religious activities or institutions," would seem to suggest that the *Allen* test is controlling. Paradoxically, however, the majority, in the face of *Allen* and without legal justification, conducts an extensive exploration of the evidence relating to the religious "atmosphere" in the Roman Catholic schools. In my view, *Allen* renders such an exploration irrelevant.

Finally, I would emphasize anew that I agree with the majority that *Walz* v. *Tax Commission of New York City*, — U.S. — (May 4, 1970) supplements *Allen*, to the extent that multiple effects of a statutory scheme may be considered, including its potential to create continuing controversies inimical to the values of the First Amendment. *Walz* does not, however, provide any precedent for the majority's assumption that support of the secular educational processes of sectarian schools constitutes "substantial support of a religious enterprise."

With all respect, I concur with the majority's result and only with that portion of the majority's opinion which elaborates the implications of the "excessive entanglements" aspect of the *Walz* decision for the instant case.

RAYMOND J. PETTINE
United States District Judge
June 15, 1970

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs*

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants*

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants*

Judgment and Order

This action came on to be heard on a motion to dismiss and for trial on the merits before the Court, the Honorable Frank M. Coffin, Circuit Judge, the Honorable Raymond J. Pettine, District Judge for Rhode Island, and the Honorable Hugh H. Bownes, District Judge for New Hampshire, and after hearings thereon, arguments of counsel, the Court having rendered an opinion, dated June 15, 1970, setting forth its findings of fact and conclusions of law pursuant to Rule 52(a) of Fed.R.Civ.P., it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion to Dismiss is denied.

2. Rhode Island Public Law C. 246 (1969) is hereby declared to be unconstitutional in that it violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools.

3. The defendants and their agents are permanently enjoined from making any payments or disbursements under

Rhode Island Public Law C. 246 (1969) to teachers employed by denominational schools.

So Ordered,

RAYMOND J. PETTINE
Raymond J. Pettine
U.S.D.C.J.
June 17, 1970

NEAL MURPHY
Neal Murphy
Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 69-4239

JOAN DICENSO, ET AL., *Plaintiffs*,

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants*,

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants*.

Notice of Appeal to the Supreme Court of the United States

1. Notice is hereby given that the intervenor-defendants in the above-captioned matter do hereby appeal to the Supreme Court of the United States from the final judgment declaring Rhode Island's Salary Supplement Law unconstitutional and enjoining the operation of that statute, entered in this action on June 17, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

2. Pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States, the Clerk is requested to certify and to transmit to the Supreme Court

of the United States the entire record of the proceedings herein.

Dated: June 26, 1970

/s/ Edward Bennett Williams
Edward Bennett Williams
1000 Hill Building
Washington, D. C. 20006

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APPENDIX D

R. I. Public Laws (1969)

CHAPTER 246.

AN ACT Providing for Salary Supplements to Non-public Schoolteachers and in Amendment of and in Addition to Title 16 of the General Laws Entitled "Education," as Amended.

It is enacted by the General Assembly as follows:

Section 1. Title 16 of the general laws entitled "Education," as amended, is hereby further amended by adding thereto the following chapter:

"CHAPTER 51

"Salary Supplements to Nonpublic Schoolteachers

"16-51-1. Legislative findings—Declaration of policy. —The general assembly being charged by the constitution of this state with the duty not only of promoting public schools but also adopting 'all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education' makes the following findings: The public laws of 1960, chapter 27, declares: "It is the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth." This statute implements that policy by providing that the state shall assist the cities and towns by paying part of the operating revenues for the public schools.

But there are in Rhode Island approximately 45,000 children attending nonpublic elementary schools. They constitute about 25% of the total school population at these age levels.

Because nonpublic schools enroll such a significant portion of the total school population of the state, the

state's policy of providing a quality education for all Rhode Island youth would be seriously impaired if the quality of education provided in said schools were to deteriorate.

Nonpublic schools are finding it increasingly difficult to maintain their traditional quality, due to rising costs. This is particularly serious with regard to the salaries of teachers; without adequate salary scales, no school can attract sufficient numbers of competent, dedicated teachers; and teachers are the prime factor in educational quality. These facts were recognized for the public schools in 1960, and dealt with by the passage of chapter 27 of the public laws of that year.

It is, therefore, the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike; within the limitations imposed by the constitutions of the United States and of Rhode Island. In pursuance of said policy, in order to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality, we hereby enact the following:

"16-51-2. Definitions.—As used in this chapter unless the context clearly indicates otherwise:

1. 'Nonpublic school' shall mean any school not operated for profit, other than a public school, within this state wherein a resident of this state may legally fulfill the compulsory school attendance requirements of the law, except such schools whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations as determined by the commissioner of education.

2. 'Nonpublic school teacher' shall mean a teacher who teaches in a nonpublic school exclusively only those subjects required to be taught by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

"16-51-3. Eligibility for salary supplement.—Every nonpublic schoolteacher shall, upon his or her request, be paid by the state through the commissioner of education, a salary supplement in the amount fixed by law in such installments and at such intervals as shall be fixed by regulation promulgated by the commissioner of education. As a condition for the payment of such salary supplement the commissioner of education shall be satisfied that the teacher:

1. Is one who teaches in any grade from grade one through grade eight exclusively only those subjects required to be taught by state law to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

2. Has a teaching certificate issued by or under the authority of the state board of education in substantially the same manner that such certificates are issued to teachers in public schools.

3. Is receiving a salary which, including the salary supplement, meets the minimum salary standards for public schools required for eligibility under title 16, chapter 7 of the general laws of Rhode Island.

4. Is using only teaching materials which are used in the public schools of the state.

5. Is one who does not teach a course in religion and who signs a statement in which he or she promises not to teach a course in religion for so long as or dur-

ing such time as he or she receives any salary supplements provided for under the provisions of this chapter.

"16-51-4. Amount of supplement—How determined. —The amount of salary supplement to be paid to an eligible nonpublic schoolteacher shall be fifteen per cent (15%) of his or her current salary, which salary, including the salary supplement, is not in excess of the average maximum salary paid to public schoolteachers in this state as determined by the commissioner of education.

"16-51-5. Regulation by commissioner of education. —It shall be the duty of the commissioner of education to promulgate regulations for the purpose of carrying out the provisions of this chapter. Such regulations shall include rules and procedures for making payments of salary supplements to eligible teachers; said regulations however must provide that said payments be made by the state directly to the teacher and not through the agency of the nonpublic school in which the teacher is employed. Such regulations shall also insure that the teacher is receiving the minimum salary provided for in section 3 of this chapter, and to that end the financial records of the nonpublic school pertaining thereto shall be subject to auditing by the state department of education. Such regulations shall also insure that any nonpublic school, as that term is defined earlier in this chapter, which employs teachers who receive salary supplements as provided for in this chapter shall comply with the provisions contained in title VI of the civil rights act of 1964.

"16-51-6. Commission to study aid to nonpublic schools.—There is hereby created a commission to consist of nine (9) members to be appointed by the governor, one of whom shall be designated by the governor as chairman. The commission is to study and evaluate

state aid to nonpublic schools and is to report its findings and recommendations to the governor before January 1, 1970.

"16-51-7. Annual appropriations—Disbursements.—There is hereby appropriated out of any funds in the general treasury not otherwise appropriated the sum of three hundred seventy-five thousand dollars ($375,000.00), for the purpose of carrying out the provisions of this chapter; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sums, or so much thereof, as may from time to time be required within the amount appropriated, upon receipt by him of proper vouchers approved by the department of education.

"16-51-8. Severability.—If any clause, sentence, paragraph, or part of this chapter or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid or void, such judgment shall not affect, impair, or invalidate the remainder of this chapter or its application to other persons or circumstances.

"16-51-9. Liberal construction of act required.—This act shall be construed liberally in aid of its declared purposes."

Sec. 2. This act shall take effect on July 1, 1969.

FILE COPY

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island, *Defendants-Appellants,*

and

JOHN R. FARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. McELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS WALTER, MARGARET MARY COMMISKEY and CORNELIUS A. CUMMISKEY, *Intervenor-Appellants,*

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING and MARIE FRIEDEL, *Plaintiffs-Appellees.*

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

JURISDICTIONAL STATEMENT

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STATUTE:

Rhode Island Salary Supplement Act, Rhode Island Public Laws Chapter 246 (1969) .....*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island, *Defendants-Appellants,*

and

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY, *Intervenor-Appellants,*

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING and MARIE FRIEDEL, *Plaintiffs-Appellees.*

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

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JURISDICTIONAL STATEMENT

Defendants-Appellants appeal from the final Judgment and Order of a three-judge court of the United States District Court for the District of Rhode Island which held Chapter 246 of the Rhode Island Public Laws, 1969, known as the Salary Supplement Act, to be unconstitutional as violative of the establishment clause

of the First Amendment of the Constitution of the United States and permanently enjoined the defendants-appellants from making payments authorized by said Act.

This Statement is submitted to show that this Honorable Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The majority and separate concurring opinion of the District Court is not yet reported but is printed as Appendix A to this Jurisdictional Statement.

JURISDICTION

The Judgment and Order of the District Court was entered on June 17, 1970, and is printed as Appendix B to this Jurisdictional Statement. The defendants-appellants filed their notice of appeal in the District Court on June 25, 1970. The notice of appeal is printed as Appendix C to this Jurisdictional Statement. This appeal is taken pursuant to Title 28 of the United States Code § 1253. *Briggs* v. *Elliott*, 342 U.S. 350 (1952), and in conformity with the procedure in *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963).

STATUTE INVOLVED

The statute involved in this appeal and which was held unconstitutional by the District Court below is Chapter 246 of the Rhode Island Public Laws, 1969, entitled "AN ACT Providing for Salary Supplements to Non-public Schoolteachers . . . " and is printed as Appendix D to this Jurisdictional Statement.

This Act permits teachers, teaching secular subjects only, in non-public elementary schools to apply for a

salary supplement of up to fifteen (15%) percent of the salaries received by teachers in public elementary schools. To qualify for such aid the teacher must have the teaching certificate issued by the State Board of Education to teachers in public schools; must teach only secular subjects as taught in public schools; must use only the teaching materials used in public schools and must sign a statement promising not to teach a course in religion while receiving the salary supplement.

The legislative findings recite that the Rhode Island General Assembly is charged with the duty of securing for all its people the advantages and opportunities of education; that the policy of the State is to provide a quality education for all of its youth; that in 1960 the State began to assist the cities and towns of the State by paying part of the operating revenues for all public schools; that in Rhode Island approximately 45,000 elementary school students, or about twenty-five (25%) percent of all elementary school students attend non-public schools; that because of the numbers enrolled the non-public schools are vital to Rhode Island's educational effort; that the rising costs of teachers' salaries is making it increasingly difficult for non-public schools to attract competent teachers who will provide a quality education to students in non-public schools and that the State's policy of providing a quality education for all Rhode Island youth would be seriously impaired if the quality of education in non-public schools were to deteriorate.

The specific purpose of the Act is " . . . . to assist non-public schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet standards of quality . . . "

QUESTION PRESENTED

Does the Rhode Island Salary Supplement Act violate the Establishment Clause of the First Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This action was brought by a group of individuals, each of whom is a resident citizen and taxpayer in the United States and in the State of Rhode Island, to enjoin the Commissioner of Education of the State of Rhode Island, the General Treasurer of the State of Rhode Island, and the Controller of the State of Rhode Island from making salary supplement payments to teachers in non-public elementary schools pursuant to C246 of the Rhode Island Public Laws of 1969, commonly referred to as the Salary Supplement Act.

The complaint in substance alleges that the Act violates both the Establishment and Free Exercise Clauses of the First Amendment of the Constitution of the United States because it permits public funds to be used to supplement the salaries of certain teachers of secular subjects in non-public schools; that Catholic schools are the prime beneficiaries of the Act; that the purpose and primary effect of the Act is the advancement of religion, and prays that the Act be declared unconstitutional and that the defendants be enjoined from making the payments authorized by the Act.

Intervenors are teachers and parents of children in non-public schools.

The Salary Supplement Act, so-called, permits certain teachers in non-public elementary schools who meet the requirements of the Act to apply for and re-

ceive a supplement to their salary. The Act requires that a teacher to qualify for the salary supplement must be certified to teach by the State Board of Education; must teach in a non-public elementary school in which the per capita cost per pupil is no greater than the cost per pupil in a public elementary school; must teach only secular subjects to the same extent as taught in public schools; must use only teaching materials used in the public schools and must not teach a course in religion and signs a statement not to do so during any period for which a salary supplement is received.

Under 16-51-5 of said Act payments must be made directly to the teacher and not through the agency of the school.

The amount of the authorized salary supplement is fifteen (15%) percent of the current salary which, including the supplement, is not in excess of the average maximum salary paid to public school teachers in the State.

The case was heard on the merits and substantial evidence in the form of oral testimony, depositions and documents was introduced.

In reaching its decision the majority of the court below relied on the purpose and effect test enunciated in *Abington School District* v. *Schempp,* 374 U.S. 203, 223 (1963), relied on in *Board of Education* v. *Allen,* 392 U.S. 236 at 245-247 (1968) and refined in *Walz* v. *Tax Commission of New York City,* 38 U.S.L.W. 4347 (U.S. May 4, 1970). App. A, pp. 12a, 14a-15a.

The court concluded that:

(a) The purpose of the Act was entirely secular. App. A, pp. 3a-4a, 12a.

(b) The effect of the Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment. App. A, pp. 18a-19a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND ARE OF NATIONAL IMPORTANCE

1. This Honorable Court has recently noted probable jurisdiction and has set for argument the cases of *Lemon, et al* v. *Kurtzman, et al,* No. 89, 1970 Term, and *Tilton, et al* v. *Richardson, et al,* No. 153, 1970 Term.

Lemon, supra, calls into question a Pennsylvania Statute permitting public funds to be used to purchase secular education from religiously affiliated schools as being violative of the Establishment and Free Exercise Clauses of the United States Constitution.

Tilton, supra, calls into question a Federal Statute permitting the use of federal funds for the erection of secular buildings for denominational colleges as being violative of the Establishment and Free Exercise Clauses of the United States Constitution.

The instant case calls into question a Rhode Island Statute permitting public funds to be used to supplement the salaries of teachers teaching secular subjects in religiously affiliated schools.

The central issue in each of these cases is substantially the same. The addition of the instant Rhode Island case will add an additional depth and dimension to the consideration and decision of the issues presented.

2. The court below misapplied the decision in *Allen, supra,* by giving paramount focus to the parochial character of the school rather than the secular activity being assisted under the Statute.

3. The court below misconstrued the effect of the decision in *Walz, supra,* on the decision in *Allen, supra,* by concluding that the involvement of civil and ecclesiastical authorities in determining what is religious and what is secular is the principal factor in the primary effect test.

CONCLUSION

The Federal questions presented by this appeal are substantial and of national importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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July 25, 1970

APPENDIX

APPENDIX A

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs,*

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants,*

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants.*

Opinion

June 15, 1970

Before FRANK M. COFFIN, *Circuit Judge:* RAYMOND J. PETTINE, *District Judge—Rhode Island:* HUGH H. BOWNES, *District Judge—New Hampshire.*

COFFIN, Circuit Judge. Rhode Island's Salary Supplement Act, R. I. Public Laws c. 246 (1969), provides for the payment of state funds to teachers of secular subjects in non-public elementary schools. At present the sole beneficiaries of this statute are teachers in Roman Catholic schools. This suit seeks a declaration that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and an injunction against its continued operation.

Plaintiffs are citizens and taxpayers of the state of Rhode Island. The named defendants include Rhode Island's Commissioner of Education, the state Treasurer, and the state Controller, all of whom are involved in the administration of the Act. In addition, a couple with children in parochial schools and several teachers eligible for aid under the statute have been permitted to intervene

under Rule 24(b), Fed. R. Civ. P. Jurisdiction is based on 28 U.S.C. § 1343(3). Since the complaint seeks to enjoin a state law as repugnant to the Constitution, this three-judge court has been convened pursuant to 28 U.S.C. §§ 2281, 2284.

The complaint alleges in substance that Catholic schools are the primary beneficiaries of the Act, that the goal of these schools is the propagation of the Catholic faith, and that the statute therefore has as its purpose and primary effect the advancement of religion. Plaintiffs also claim that the statute constitutes compulsory taxation in aid of religion and thus violates the Free Exercise Clause. In their answers, defendants and defendant-intervenors have stressed that the Act aids teachers, not schools, and have denied plaintiffs' conclusion concerning the purpose and effect of the Act. Defendant-intervenors have also alleged that the injunctive relief sought by plaintiffs would infringe the free exercise of religion of those whose children attend parochial schools.[1]

The case is now before us for final decision on the merits of plaintiffs' and intervenors' constitutional claims. We have held a hearing, at which we received depositions and

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[1] Defendants also filed a motion to dismiss on the grounds that plaintiffs lacked standing. This objection we find to be without merit. The standing of taxpayers to challenge state expenditures which infringe the Establishment Clause has long been settled. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). The more recent two step analysis suggested in *Association of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150 (1970), produces the same result. Plaintiffs allege that their tax dollars are being misspent, thus establishing injury in fact. It is also clear that the Establishment Clause was intended to limit the use of public funds in support of religious institutions. *Flast* v. *Cohen*, 392 U.S. 83, 103-104 (1968); *see Everson* v. *Board of Education*, 330 U.S. 1, 11-13 (1947). Thus the interest asserted by plaintiffs is within the zone protected by the First Amendment. *Accord*, *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (E.D. Pa., 1969), *prob. juris. noted*, 38 U.S.L.W. 3401 (U.S. April 21, 1970).

documentary evidence, and heard testimony from the Superintendent of Schools for the Archdiocese of Providence, an Associate Commissioner of Education for the state of Rhode Island, and several teachers eligible for aid under the statute. On the basis of this record, we make the following findings of fact and reach the following conclusions of law in compliance with Rule 52(a), Fed. R. Civ. P.[2]

I. *Findings of Fact*

A. *The Statutory Scheme*

The Salary Supplement Act opens with a statement that its general purpose is to implement the established state policy of providing "a quality education for all Rhode Island youth".[3] This declaration is followed by specific legislative findings: that non-public elementary schools enroll 45,000 students, or 25 per cent of Rhode Island's elementary school children; that because of the numbers enrolled, these schools are vital to Rhode Island's educational effort; and that the rising cost of teachers' salaries makes it increasingly difficult for these schools to maintain their traditional quality. The specific purpose of the Act is, in the language of the statute, "to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." To accomplish this objective, the

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[2] In making these findings, we have taken into consideration the evidentiary objections of defendants and intervenors. We have declined to consider evidence concerning the activities of proponents of the Salary Supplement Act for reasons discussed *infra* p. 15 and have also ignored sociological evidence introduced in plaintiffs' post-trial memorandum. We reject, however, intervenors' view that the only relevant evidence concerned the activity subsidized, i.e., secular teaching in parochial schools. Such a narrow view of relevance in effect prejudges the central legal issues of the case.

[3] *Compare* R. I. Const. Art. XII, § 1; R. I. Gen. Laws § 16-7-15 (Supp. 1967).

legislature appropriated $375,000 to pay up to 15 per cent of the salaries of teachers of secular subjects in non-public elementary schools. The Act defines "non-public" school to mean a non-profit school whose average per pupil expenditure on secular education does not exceed the average for the state's public schools during a specified period. To qualify for aid, a teacher must have a teaching certificate, must teach a course similar to those offered in Rhode Island's public schools using text books approved for public school use,[4] and must agree not to teach a class in religion.

Regulations implementing the Act call for semi-annual payments to eligible teachers in February and June.[5] Applicants must sign a "Statement of Eligibility" promising not to teach a course in religion and to use only teaching materials employed in the state's public schools. The Commissioner of Education also requires non-public schools to submit data concerning enrollments and total expenditures. If this data indicates a per-pupil expenditure in excess of the statutory norm, an agent of the Commissioner must examine the books of the school in question in order to determine how much of its spending was attributable to secular education and how much to religious.

To date, this final breakdown into secular and religious expenses has proved necessary in only one case. Only two non-public schools have reported expenditures in excess

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[4] *See* R. I. Gen. Laws §§ 16-23-2 and 16-1-9 (Supp. 1967), which authorize local school committees to furnish parochial school children with any mathematics, science or foreign language textbook which appears on the Commissioner of Education's list of books approved for public school use.

[5] The first payment scheduled for February 1970 was delayed by a temporary restraining order entered by the single judge to whom the complaint was originally submitted. The restraining order was allowed to lapse by agreement of the parties, and plaintiffs have waived their prayer for a preliminary injunction.

of the statutory norm, and teachers at one of these schools failed to apply for aid, thus obviating the need for further inquiry.[6] Approximately 250 teachers have applied for aid. It is undisputed that all of these applicants are employed by Roman Catholic schools.

B. *Nature of the Crisis Leading to the Statute*

The evidence introduced at trial fully corroborates the legislature's finding of a financial crisis in non-public education, but indicates that the crisis is largely confined to Rhode Island's Catholic schools. Approximately 95 per cent of the elementary school children attending non-public schools are enrolled in Roman Catholic elementary schools. The financial crisis in these schools stems from the rapidly changing composition of their faculties. As recently as ten years ago, the Archdiocese of Providence relied almost exclusively on nuns to staff its school system. Lay teachers filled only 4 or 5 per cent of the system's 1200 teaching positions. By 1969, lay teachers constituted one third of the teaching force. In the academic year 1970-1971, the great majority of parishes will require at least one additional lay teacher, with some needing two or three more. This precipitous increase in lay personnel—an increase which is expected to continue—has placed a double burden on the parish budgets which finance almost all of the 98 elementary schools. Each shift from a teaching sister to a lay teacher represents a threefold increase in salary expense (i.e., a shift from approximately $1800 to $5500 at present levels). Moreover, the increasing salary levels in public schools make the task of recruiting lay teachers annually more expensive.

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[6] It is worthy of note that these schools were the only non-Catholic schools to report their expenditures to the Commissioner. As long as Catholic schools rely heavily on nuns, their wage costs are likely to remain substantially below those of public schools, *see infra* p. 6, thus obviating the need to break down expenditures.

The Salary Supplement Act will not relieve the parishes or parents of their escalating burden, but will temporarily enable parochial schools to compete for qualified teachers. A comparison of past and predicted salary levels confirms the limited impact of the statute. In 1968-1969, a starting lay salary in the parochial schools was $5000 a year. In 1969-1970 the diocesan school system offered $6000, hoping that 15 per cent of this amount, or $900, would be paid by the state under the Supplement Act. In the meantime, however, the standard beginning salary for public elementary school teachers in Providence and elsewhere has increased from $6000 to $7000. Even assuming, as does the Superintendent of the diocesan school system, that the parochial schools can compete effectively for teachers if they come within $500 of public school salaries, the diocese must offer a starting salary of $6500 in 1970, of which $975 would be paid by the state and $5525 would be paid by the parish—an increase of ten per cent over the $5000 parish expenditure pre-1969.

The financial implications for both the parishes and the state are clear. Even to continue to subsidize the salaries of the present teacher-recipients at the present percentage figure will cost both the state and the parishes substantially more during the coming school years. But already the Superintendent of the diocesan school system has informed elementary school principles that he expects the present ratio of two sisters to one lay teacher to give way to a one to one ratio in the near future. Moreover, the Superintendent acknowledged at trial that almost all of the teaching staff might be lay persons within five years. Since, as we have seen, the substitution of a lay for a religious teacher means, even at present rates, a threefold increase in salary cost, it is obvious not only that the parochial schools face a monumental and deepening financial crisis but also that the objective and rationale of the Salary Supplement Act—to enable non-public schools to compete effectively for qualified teachers—will inescapably require

substantially greater appropriations subsidizing substantially greater percentages of the salaries of lay teachers.

C. The Parochial School System

At trial, the parties went beyond the immediate financial crisis in parochial schools to explore the operations of the diocesan school system as a whole. Plaintiffs' evidence was designed to show the close financial and pedagogical nexus between Church and school. Intervenors' testimony explored the teaching of secular subjects in these schools. From this evidence, the following picture emerges.

Rhode Island's Catholic elementary schools are under the general supervision of the Bishop of Providence, and of his appointed representative, the Diocesan Superintendent of Schools. The financing of these schools varies: in some, substantial tuition is charged covering up to 40 per cent of school costs; others charge only a nominal fee and rely on general parish revenues to make up the balance. In most cases, however, the parish assumes the ultimate financial responsibility for the school, and the pastor assumes the ultimate responsibility for the allocation of parish funds. School principals are, with two exceptions, nuns appointed either by the Superintendent or by the Mother Provincial of the order staffing the school. Lay teachers are first interviewed by the Superintendent's office, then by the school principal, with the contract being signed by the pastor of the parish. The Diocese sets minimum salary standards for both lay teachers and nuns, but some discretion is left to the individual pastor in negotiating actual salary levels.

The ground rules for school principals are set forth in a "Handbook of School Regulations", having "the force of synodal law in the diocese." The impression of tidy central management which the Handbook conveys was somewhat dispelled at trial when the Superintendent testified that the Handbook had been frequently superseded either by in-

formal directive or by common practice. Testimony also indicated that individual principals, whether by design or oversight, felt free to make minor modifications in diocesan programs to fit the particular needs of the school.

The main thrust of the Handbook, however, remains clear. The keynote of education in a parochial school is perhaps best reflected in the Handbook's remarks about the importance of a teacher: "The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher. . . ." Consistent with this view is the Handbook's view of the scope of religious activities: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Teachers are further advised by the Handbook to try to stimulate interest in pursuing religious vocations and in missionary work.

This concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school. This testimony gains added credibility from the fact that several of the teachers were non-Catholics. Moreover, because of the restrictions of Rhode Island's textbook loan law, R.I. Gen Laws §§ 16-23-2, 16-1-9 (Supp. 1967), and the explicit requirement of the Salary Supplement Act, teaching materials used by applicants for aid must be approved for use in the public schools.

Nevertheless, the diocesan schools do possess a number of distinctively religious attributes which distinguish them from public schools. Each parochial school is in close proximity to the parish church, allowing a convenient access for Mass or other religious exercises. The exterior of the school often has an identifying cross; each classroom contains a crucifix and school interiors generally exhibit re-

ligious paintings and statuary. Classes each day begin with a prayer; some schools schedule additional times for prayer. Roughly thirty minutes a day or one hundred fifty minutes a week are devoted to religious instruction. Assembly programs sometimes include a speaker on religious vocations or missionary activity, and some extra-curricular activities, such as altar or choir boy training and missions programs, are religiously oriented. Students and faculty participate in a yearly retreat and all teachers participate in a two day annual meeting of the Catholic Teachers Institute in which the teaching of religion is occasionally discussed. Occasional guidance counselling, including religious counselling, takes place at the elementary level.

In addition to these factors, the Church gains special advantage from a curriculum which contains both religious and secular subjects. When religion is part of the school day, children can be instructed in their faith more frequently, with less absenteeism, and with greater attention to the religious development of each child. Moreover, religious instruction can be staggered throughout the day to utilize more effectively the limited number of qualified teachers of religion. Finally, we note that the presence of dedicated sisters, though diminishing in numbers, provides an atmosphere where religious instruction and religious vocations seem natural parts of everyday life. Indeed, concern for this intangible "religious atmosphere" has led the Superintendent to decide tentatively to attempt to maintain a one sister to one lay teacher ratio in most of the diocesan schools rather than permitting some to be staffed predominately by lay teachers. To go below this norm would, the Superintendent feared, dilute the Catholic atmosphere of the parochial schools.

Implicit in these findings, we think, is the further finding that the diocesan school system is an integral part of the religious mission of the Catholic Church. It is not that religious doctrine overtly intrudes into all instruction.

Rather the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation. It also seems clear to us that this essentially religious enterprise cannot succeed without good teaching in secular subjects. If the quality of teaching falls too low, then not only will Catholic parents be reluctant to enroll their children, but the parochial schools would also run afoul of Rhode Island's education laws.[7] Good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms.

These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise.

II. *Conclusions of Law*

A. *Plaintiffs' First Amendment Claims*

With these findings in mind, we turn to the central legal issue of the case, whether Rhode Island's Salary Supplement Act violates the First Amendment's provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", as applied to the states through the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Everson* v. *Board of Education, supra* n. 1.

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[7] R. I. Gen. Laws § 16-19-2 sets standards for private schools and requires them to obtain the approval of the local school committee to satisfy compulsory attendance laws. *See also* R. I. Gen. Laws § 16-22-2.

Plaintiffs' free exercise claim need not long detain us. In their complaint, plaintiffs alleged that the statute infringed on the free exercise of their religion by forcing them to pay taxes for religious purposes. But plaintiffs offered no testimony concerning their personal religious beliefs and practices, or lack thereof. Thus they have failed to introduce the kind of particularized evidence necessary "to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963).

The heart of plaintiffs' case lies in their claim that the Act violates the Establishment Clause. Much of the dispute at trial centered on the appropriate standard for gauging this claim. As of the date of argument in this case, there were three dominant precedents from which the parties drew sustenance. The first was *Everson*, in which the Court upheld a New Jersey statute which permitted reimbursement to parents for bus fares of children attending both public and parochial schools. The second was *Schempp*, proscribing prayers in public schools. The third was *Board of Education* v. *Allen*, 392 U.S. 236 (1968), which upheld a New York law requiring local school boards to loan textbooks to children attending parochial schools.

Plaintiffs have mounted a preliminary attack based on a statement in *Everson* that, "No tax in any amount, large or small, can be levied to support any religious activities or institutions." 330 U.S. at 16. Since the Act appropriates tax monies for employees of religious institutions, plaintiffs maintain, it is clearly unconstitutional. Whatever the continued vitality of the *Everson* test, however, we are satisfied that it cannot be applied in such a literal manner. Although in both *Everson* and *Allen*, tax funds were used to support religious institutions, in both the aid was sustained. Plaintiffs distinguish these cases on the grounds that the cost of bus fares in *Everson* and textbooks in *Allen* was originally borne by the parents rather than the schools.

But assuming that state subsidies of buses or books otherwise pass constitutional muster, we find it difficult to believe that these laws would fail because prior to enactment parents bore the costs indirectly, in the form of higher school bills, rather than directly. *Accord, Lemon* v. *Kurtzman*, 310 F. Supp. at 47-48; *Tilton* v. *Finch*, — F. Supp. — (slip opinion at 11-12) (D. Conn. March 19, 1970).

Perhaps recognizing the shortcomings of the *Everson* formulation, both plaintiffs and defendants have focused their argument on the purpose and effect test relied on in *Allen*, 392 U.S. at 243, and first enunciated in *Schempp*:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ." 373 U.S. at 222.

The first part of this test—determining the statute's purpose—presents little difficulty. The Salary Supplement Act, in our opinion, was not intended to advance or interfere with religion. The statute itself recites that its purpose is "to provide a quality education for all Rhode Island youth, those in public and non-public schools alike." Certainly, the quality of education in non-public schools is a legitimate legislative concern. *Board of Education* v. *Allen*, 392 U.S. at 245-247. We find nothing in the history and structure of the Act which suggests that the legislative purpose was other than as declared.

In reaching this result, we necessarily reject plaintiffs' attempt to divine the "true intent" of the legislature by inspecting the activities of lobbyists. As Mr. Justice Frankfurter observed in *McGowan* v. *Maryland*, 366 U.S. 420, 469

(1961), "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing." *See United States* v. *O'Brien*, 391 U.S. 367, 383-385 (1968). Nor do we think that the legislature revealed a forbidden motive when it stated that the proposed legislation was designed "to assist non-public *schools* to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." (Emphasis added.) Phrasing the test in terms of schools instead of students does not, we think, obscure the legislature's legitimate concern for the quality of education afforded to Rhode Island youth. Finally, while the restriction of aid to schools whose per pupil expenditure does not exceed that of the public schools may result in excluding, for the most part, private but non-parochial schools from the scope of the statute, this provision also serves the legitimate secular purpose of saving state funds by eliminating schools which can well afford qualified teachers.[8]

The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "*the* primary effect", as *Schempp* seems to require, are likely to be no more satis-

[8] This aspect of the statute comes close to being a "religious gerrymander". Harlan, J. concurring in *Walz* v. *Tax Commission*, 38 U.S.L.W. at 4356. Nevertheless, the standard chosen is religiously neutral and almost any criteria based on financial need would produce the same result.

factory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities.[9] Equally important, government aid to purely secular activity may nevertheless involve the state so deeply in the workings of religious institutions "as to give rise to divisive influences and inhibitions of freedom." *Abington School District* v. *Schempp,* 374 U.S. at 307 (Goldberg, J. concurring). Such embroilments would escape the narrow focus of intervenors' test.

These deficiencies in the *Schempp* test were, we think, recognized in the recent case of *Walz* v. *Tax Commission of New York City,* 38 U.S.L.W. 4347 (U.S. May 4, 1970),

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[9] Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. Finally, we do not intend our reference to "sophisticated bookkeeping" to imply only sham allocations of expenditures; an accounting system might honestly allocate only a small portion of the total costs of a parochial school to the religious function.

upholding New York's tax exemption for property used for religious purposes. The test as phrased by Chief Justice Burger is still two pronged:

> "Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." 38 U.S.L.W. at 4348.

The Chief Justice's phrasing and application of the effect test, however, mark a significant refinement. Gone are the intimations of *Schempp* that the single predominant effect of a statute may be isolated by a process of deductive reasoning based on principle and precedent.[10] Instead, the Court focuses on whether the statute fosters "exclusive entanglement" between government and religious institutions. Such entanglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinently, in discussing the alternatives of taxing or exempting church property, the Chief Justice observes:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." 38 U.S.L.W. at 4350.

Walz thus makes it clear that the test of a statute's effect is not whether the secular result is more important than

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[10] Indeed, we note that neither the majority nor the concurring opinions rely on the *Schempp* formulation.

the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards.

When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions involved in *Walz*, must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of "secular" education such as Rhode Island already provides its public schools.[11]

On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suit-

[11] Rhode Island once provided a flat grant for public school teachers' salaries, R. I. Gen. Laws § 16-6-3 *et seq.* (1956), but this system has now been replaced by a percentage subsidy of the cost of education. R. I. Gen. Laws § 16-7-15 *et seq.* (Supp. 1967).

able for public school use. *Compare* R. I. Gen. Laws § 16-1-9 (Supp. 1967).[12] Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This ongoing administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen*, 392 U.S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman*, 310 F. Supp. at 52, private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same stand-

---

[12] *But see* Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 Yale L. J. 111 (1969), which reviews the contents of the books actually supplied under the New York law and concludes that many were infused with a sectarian viewpoint.

ards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296 (1966).[13] Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), and in the hiring and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969).[14] At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that

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[13] We note the increasing resort to the federal courts to rectify alleged wrongs committed by school authorities acting under the color of state law. *E.g., Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) (peaceful protest by high school students); *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (procedural due process for students); *Richards* v. *Thurston*, — F.2d — (1st Cir. April 28, 1970) (length of student's hair).

[14] The regulations of Rhode Island's Commissioner of Education require schools whose teachers apply for aid to comply with Title VI of the Civil Rights Act of 1964, surely the minimum we may expect of any organization receiving significant public support. More difficult problems loom down the road. For example, one pastor deposed that he would refuse to hire a teacher who had been divorced and remarried. The religious discrimination which sectarian schools must of necessity practice may also be used to cloak other, less desirable forms of discrimination. *See, e.g.*, W. Morris, *Yazoo . . . Notes on Survival*, Harper's Magazine 43, 53 (June, 1970). Whatever their solution, these problems indicate that we would have to rethink much of our law, especially the law of equal protection, in order to accommodate an institution which receives significant state aid and yet discriminates on principle.

the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment.[15] *Accord, Opinion of the Justices,* 261 A.2d 58 (Me. Jan. 15, 1970).

B. *Intervenors' First Amendment and Equal Protection Claims*

There remains for our consideration the equal protection claim of the teacher-intervenors and the free exercise claim of the parent-intervenors. The equal protection claim is the more elusive of the two. Teacher-intervenors apparently assume a Salary Supplement Act restricted by judicial decree to aiding teachers in non-public but secular schools. Such a statutory scheme, intervenors argue, would violate equal protection because it discriminates among teachers of secular subjects on an impermissible ground—i.e., religion. Their argument remains somewhat hypothetical since, as we have seen, the only applicants for aid have been parochial school teachers. Intervenors are, in other words, complaining of the abstract possibility of discrimination rather than the thing itself. Moreover, intervenors' hypothetical scheme would not discriminate on the basis of the teachers' personal beliefs—surely a suspect classification—but on the basis of the institutions which employ them. This distinction between secular institutions which are eligible for subsidy and religious institutions which are not seems to us commanded by the Establishment Clause. Thus,

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[15] While we conclude that Rhode Island's statute is unconstitutional, we do not wish to be read as condemning aid in any form to institutions affiliated with religion. We do not, for example, disagree with the result in *Tilton* v. *Finch, supra,* which upheld a federal enactment subsidizing secular facilities at private colleges, including church-related colleges. The degree of institutional involvement required by the federal program was episodic and relatively slight. Moreover, denominational colleges do not have the same close financial, legal, and pedagogical relationship to the Church as do parochial schools.

even though religion in general may be a suspect classification, the mandate of the Establishment Clause provides an overriding justification in this case. *Cf. Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

The parent-intervenors present a more plausible claim, based on the Free Exercise Clause. Their complaint rests on the conviction that children take their values to a large extent from their school environment; a school without religion conveys to the child the notion that religion is unimportant. Because of this conviction, parent-intervenors feel in conscience bound to send their children to parochial schools which teach both secular subjects and religion. If, however, the quality of secular education falls too low in parochial schools, parent-intervenors may well be forced to ignore the dictates of conscience by sending their children to public schools. To avoid this result, intervenors argue that the free exercise benefits which flow from aid to parochial education should prevail over the Establishment Clause values protected by strict separation, citing in support of their argument *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

While sympathetic to intervenors' dilemma, we note that it stems primarily from their personal evaluation of public school education. We reject the notion that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated. *See* Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1686-1687 (1969). Certainly it would be anomalous if the First Amendment required the state to exclude religion from the public schools but at the same time to support an entire separate school system in order to facilitate the teaching of religion. Such a result is not compelled by *Sherbert* v. *Verner*, *supra*, which required a minor change in a welfare program to

accommodate sabbatarians. The Court was careful to note that such minor accommodation did not entail the kind of involvement of religious and secular institutions forbidden by the Establishment Clause. 374 U.S. at 409. The Court also noted that some burdens on the free exercise of religion could be justified by a compelling state interest requiring uniformity of regulation. 374 U.S. at 406-409. Our case falls within both these exceptions. Not only does the Salary Supplement Act embroil religious and secular institutions, but the Establishment Clause values can be preserved only by denial of direct subsidies to parochial schools. We therefore reject the free exercise claim of parent-intervenors.

III. *Conclusion*

Plaintiffs are entitled to a declaratory judgment that R. I. Public Laws c. 246 (1969) violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools, and to an injunction forbidding defendants and their agents from making disbursements to such teachers.

FRANK M. COFFIN
Frank M. Coffin
U. S. Circuit Judge

HUGH H. BOWNES
Hugh H. Bownes
U. S. District Judge

Dated at Providence, Rhode Island 15th day of June 1970

PETTINE, District Judge—concurring in result, concurring in part and dissenting in part with the Opinion of the Court.

The majority decision holds the Salary Supplement Act unconstitutional for two reasons: (1) its effect is substantially to support a religious enterprise; (2) its operation involves those "reciprocal embroilments of government and religion which the First Amendment was meant to avoid." I concur in the holding of unconstitutionality for the latter reason. However, my disagreement with the former reason requires my separate concurrence.

The Salary Supplement Act does not substantially support a religious enterprise; rather it supports a most important facet of the educational process in modern America, the teaching of all that knowledge presently appropriate for learning, exclusive of religion. That a distinction between the teaching of religion and non-religious subject matter in sectarian schools may be maintained for Establishment Clause purposes seems clear to me from the decision of the Supreme Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). I read *Allen* to invite the inquiry whether the state program under scrutiny has as its effect the advancement of a religion. In answering that inquiry it cannot be presumed that secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment. Only proof will establish that subsidization of an educational enterprise is subsidization of a "religious enterprise." In the instant case not only is the record barren of any proof that the teaching of secular subject matter is a "religious enterprise," but also there is unanimous unrebutted testimony from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes.

I cannot accept the majority's proposal that exclusive focus on the educational function sought to be subsidized is

too narrow a standard because "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." Such reasoning equates the legal and bookkeeping definitions of "secular" and "religious." The law is equipped to distinguish bookkeeping entries from legally distinct entities. The secular-religious distinction is fundamental; it will take more than accounting machinations to elude it.

The majority's rejection of the plaintiffs' heavy reliance on the principle stated in *Everson* v. *Board of Education*, 330 U.S. 1 at 16 (1947) that "(n)o tax in any amount, large or small, can be levied to support any religious activities or institutions," would seem to suggest that the *Allen* test is controlling. Paradoxically, however, the majority, in the face of *Allen* and without legal justification, conducts an extensive exploration of the evidence relating to the religious "atmosphere" in the Roman Catholic schools. In my view, *Allen* renders such an exploration irrelevant.

Finally, I would emphasize anew that I agree with the majority that *Walz* v. *Tax Commission of New York City*, — U.S. — (May 4, 1970) supplements *Allen*, to the extent that multiple effects of a statutory scheme may be considered, including its potential to create continuing controversies inimical to the values of the First Amendment. *Walz* does not, however, provide any precedent for the majority's assumption that support of the secular educational processes of sectarian schools constitutes "substantial support of a religious enterprise."

With all respect, I concur with the majority's result and only with that portion of the majority's opinion which elaborates the implications of the "excessive entanglements" aspect of the *Walz* decision for the instant case.

RAYMOND J. PETTINE
United States District Judge
June 15, 1970

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs*

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants*

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants*

Judgment and Order

This action came on to be heard on a motion to dismiss and for trial on the merits before the Court, the Honorable Frank M. Coffin, Circuit Judge, the Honorable Raymond J. Pettine, District Judge for Rhode Island, and the Honorable Hugh H. Bownes, District Judge for New Hampshire, and after hearings thereon, arguments of counsel, the Court having rendered an opinion, dated June 15, 1970, setting forth its findings of fact and conclusions of law pursuant to Rule 52(a) of Fed.R.Civ.P., it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion to Dismiss is denied.

2. Rhode Island Public Law C. 246 (1969) is hereby declared to be unconstitutional in that it violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools.

3. The defendants and their agents are permanently enjoined from making any payments or disbursements under

Rhode Island Public Law C. 246 (1969) to teachers employed by denominational schools.

So Ordered,

RAYMOND J. PETTINE
Raymond J. Pettine
U.S.D.C.J.
June 17, 1970

NEAL MURPHY
Neal Murphy
Clerk of Court

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4239

JOAN DICENSO, ET AL., *Plaintiffs*

v.

WILLIAM P. ROBINSON, JR., ET AL., *Defendants*

and

JOHN R. EARLEY, ET AL., *Intervenor-Defendants*

Notice of Appeal to the Supreme Court of the United States

1. Notice is hereby given that the defendants in the above-captioned matter do hereby appeal to the Supreme Court of the United States from the final judgment declaring Rhode Island's Salary Supplement Law unconstitutional and enjoining the operation of that statute, entered in this action on June 17, 1970. This appeal is taken pursuant to Title 28 of the United States Code § 1253.

2. Pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States, the clerk is requested to certify and to transmit to the Supreme Court of the United States the entire record of the proceedings herein.

Dated June 25, 1970

WILLIAM P. ROBINSON, JR.
Commissioner of Education

HERBERT F. DESIMONE
Attorney for the Defendants

/s/ HERBERT F. DESIMONE
Herbert F. DeSimone

APPENDIX D

R. I. Public Laws (1969)

CHAPTER 246.

AN ACT Providing for Salary Supplements to Non-public Schoolteachers and in Amendment of and in Addition to Title 16 of the General Laws Entitled "Education," as Amended.

It is enacted by the General Assembly as follows:

Section 1. Title 16 of the general laws entitled "Education," as amended, is hereby further amended by adding thereto the following chapter:

"CHAPTER 51

"Salary Supplements to Nonpublic Schoolteachers

"16-51-1. Legislative findings—Declaration of policy. —The general assembly being charged by the constitution of this state with the duty not only of promoting public schools but also adopting 'all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education' makes the following findings: The public laws of 1960, chapter 27, declares: "It is the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth." This statute implements that policy by providing that the state shall assist the cities and towns by paying part of the operating revenues for the public schools.

But there are in Rhode Island approximately 45,000 children attending nonpublic elementary schools. They constitute about 25% of the total school population at these age levels.

Because nonpublic schools enroll such a significant portion of the total school population of the state, the

state's policy of providing a quality education for all Rhode Island youth would be seriously impaired if the quality of education provided in said schools were to deteriorate.

Nonpublic schools are finding it increasingly difficult to maintain their traditional quality, due to rising costs. This is particularly serious with regard to the salaries of teachers; without adequate salary scales, no school can attract sufficient numbers of competent, dedicated teachers; and teachers are the prime factor in educational quality. These facts were recognized for the public schools in 1960, and dealt with by the passage of chapter 27 of the public laws of that year.

It is, therefore, the policy of the state of Rhode Island to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike; within the limitations imposed by the constitutions of the United States and of Rhode Island. In pursuance of said policy, in order to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality, we hereby enact the following:

"16-51-2. Definitions.—As used in this chapter unless the context clearly indicates otherwise:

1. 'Nonpublic school' shall mean any school not operated for profit, other than a public school, within this state wherein a resident of this state may legally fulfill the compulsory school attendance requirements of the law, except such schools whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations as determined by the commissioner of education.

2. 'Nonpublic school teacher' shall mean a teacher who teaches in a nonpublic school exclusively only those subjects required to be taught by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

"16-51-3. Eligibility for salary supplement.—Every nonpublic schoolteacher shall, upon his or her request, be paid by the state through the commissioner of education, a salary supplement in the amount fixed by law in such installments and at such intervals as shall be fixed by regulation promulgated by the commissioner of education. As a condition for the payment of such salary supplement the commissioner of education shall be satisfied that the teacher:

1. Is one who teaches in any grade from grade one through grade eight exclusively only those subjects required to be taught by state law to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.

2. Has a teaching certificate issued by or under the authority of the state board of education in substantially the same manner that such certificates are issued to teachers in public schools.

3. Is receiving a salary which, including the salary supplement, meets the minimum salary standards for public schools required for eligibility under title 16, chapter 7 of the general laws of Rhode Island.

4. Is using only teaching materials which are used in the public schools of the state.

5. Is one who does not teach a course in religion and who signs a statement in which he or she promises not to teach a course in religion for so long as or dur-

ing such time as he or she receives any salary supplements provided for under the provisions of this chapter.

"16-51-4. Amount of supplement—How determined. —The amount of salary supplement to be paid to an eligible nonpublic schoolteacher shall be fifteen per cent (15%) of his or her current salary, which salary, including the salary supplement, is not in excess of the average maximum salary paid to public schoolteachers in this state as determined by the commissioner of education.

"16-51-5. Regulation by commissioner of education. —It shall be the duty of the commissioner of education to promulgate regulations for the purpose of carrying out the provisions of this chapter. Such regulations shall include rules and procedures for making payments of salary supplements to eligible teachers; said regulations however must provide that said payments be made by the state directly to the teacher and not through the agency of the nonpublic school in which the teacher is employed. Such regulations shall also insure that the teacher is receiving the minimum salary provided for in section 3 of this chapter, and to that end the financial records of the nonpublic school pertaining thereto shall be subject to auditing by the state department of education. Such regulations shall also insure that any nonpublic school, as that term is defined earlier in this chapter, which employs teachers who receive salary supplements as provided for in this chapter shall comply with the provisions contained in title VI of the civil rights act of 1964.

"16-51-6. Commission to study aid to nonpublic schools.—There is hereby created a commission to consist of nine (9) members to be appointed by the governor, one of whom shall be designated by the governor as chairman. The commission is to study and evaluate

state aid to nonpublic schools and is to report its findings and recommendations to the governor before January 1, 1970.

"16-51-7. Annual appropriations—Disbursements.—There is hereby appropriated out of any funds in the general treasury not otherwise appropriated the sum of three hundred seventy-five thousand dollars ($375,000.00), for the purpose of carrying out the provisions of this chapter; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sums, or so much thereof, as may from time to time be required within the amount appropriated, upon receipt by him of proper vouchers approved by the department of education.

"16-51-8. Severability.—If any clause, sentence, paragraph, or part of this chapter or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid or void, such judgment shall not affect, impair, or invalidate the remainder of this chapter or its application to other persons or circumstances.

"16-51-9. Liberal construction of act required.—This act shall be construed liberally in aid of its declared purposes."

Sec. 2. This act shall take effect on July 1, 1969.

FILE COPY

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In the Supreme Court of the United States

October Term, 1969
No. ~~1188~~ 89

ALTON J. LEMON et al.,
Appellants

v.

DAVID H. KURTZMAN et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969
No. 1189

ALTON J. LEMON et al.,

Appellants

v.

DAVID H. KURTZMAN et al.,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

MOTION TO DISMISS OR AFFIRM

Appellees move that the present appeal be dismissed or that the final judgment of the District Court for the Eastern District of Pennsylvania in the present case be affirmed on the ground that the Federal Question presented is so unsubstantial as not to warrant argument thereon and further that the basic issues raised herein have been determined by this Court in its recent decisions.

QUESTIONS PRESENTED

Where the State of Pennsylvania enacted a statute authorizing state purchases of secular education services from qualified nonpublic schools, some of which may be sectarian institutions:

(1) Was the three-judge District Court below correct in finding that the statute on its face is constitutional as a matter of law and does not violate the establishment clause or free exercise clause of the First Amendment?

(2) Was the three-judge District Court below correct in refusing to consider conjectural allegations that the statute might be applied so as to violate the equal protection clause of the Fourteenth Amendment?

(3) Was the three-judge District Court below correct in granting Defendants' Motion To Dismiss in accordance with Rule 12(B)(6) of the Federal Rules of Civil Procedure as a matter of law because plaintiffs failed to state a claim upon which relief could be granted?

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania enacted in 1968 the Nonpublic Elementary and Secondary Education Act which authorizes the Secretary of Education to purchase secular educational services from nonpublic schools. The Act provides that any nonpublic school in which Pennsylvania residents may satisfy compulsory school attendance is eligible to contract with the Commonwealth to supply secular educational services.

As defined in the Act, secular educational service means the providing of instruction in a secular subject. Secular subject is defined to mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching or the morals or forms of worship of any sect.

The Commonwealth's purchase of services is restricted to certain secular subjects, namely, mathematics, modern foreign languages, physical science, and physical education. The Act authorizes the expenditure of funds only for teachers' salaries, textbooks, and instructional materials in the aforementioned courses. It requires approval by the Secretary of all textbooks and materials. Receipt of satisfactory services is measured by pupil performance on standardized tests. The Act also requires that the courses be taught by certified teachers.

Regulations enunciated by the Secretary of Education under authority of the Act require that nonpublic schools seeking to contract with the Commonwealth must set forth the subjects offered for instruction, the grade taught, the instructional classroom hours, and the number of pupils involved. They must also identify the teachers by name, state their qualifications and the percentage of the teachers' time and salary which would be allocated to the courses. The regulations require detailed information relating to textbooks, instructional materials, school accreditation, and the physical plant. This qualifying information is incorporated into the written agreement between the parties.

The consideration flowing to the Commonwealth in return for its expenditures is the implementation of its legislative obligation to maintain and improve secular education for all school-age children. The legislatively defined purpose of the Act is to promote the welfare of the people of Pennsylvania and the secular education of Commonwealth children attending nonpublic schools. More than twenty per cent of all Commonwealth children satisfy compulsory education requirements by attendance at nonpublic schools. The Act creates contractual relationships rather than subsidies, and when properly administered in accordance with its provisions is adequately safeguarded from unconstitutional administration.

Appellants ask that the statewide enforcement of the Act be enjoined by reason of its alleged unconstitutionality as violative of the First and Fourteenth Amendments of the United States Constitution. They

contend first that the Act violates the establishment clause of the First Amendment on the ground that receipt of public funds by sectarian institutions for any purpose is unconstitutional and that the use of public funds for such purpose unavoidably advances sectarian training.

Secondly, appellants contend the Act contravenes the equal protection clause of the Fourteenth Amendment by authorizing the use of public funds to encourage discrimination in schools. Appellants aver that there is a conjectural possibility that the Act might be applied in an unconstitutional manner, which requires a present declaration of general unconstitutionality.

The appellees-state officials moved to dismiss the complaint because the Act on its face is a constitutional exercise of the state's authority in conformity with the First Amendment. Furthermore, this patently valid exercise of the state's fundamental authority cannot be enjoined as unconstitutional because of speculative consequences, especially in view of the presumption of constitutional application by state officers.

The Court determined that the Pennsylvania Nonpublic Elementary and Secondary Education Act is not intended as an aid to religion, but that on the contrary it fulfills a lawful purpose, which may be lawfully implemented without violating the establishment clause of the First Amendment.

ARGUMENT

I. The Language of the Statute on Its Face Is Sufficiently Explicit To Establish Its Constitutionality Solely as a Matter of Law

Appellants, plaintiffs, below, requested a three-judge District Court for the Eastern District of Pennsylvania to declare unconstitutional a Pennsylvania statute, authorizing state purchases of secular education services from qualified schools, as repugnant to the First and Fourteenth Amendments to the United States Constitution. The Court below, after carefully reviewing the many opinions of this Court on the subject, found the state statute in question[1] to be constitutional as a matter of law.

In determining the issue, the court did not consider the motives of the Legislature; but instead, restricted its inquiry to the plain wording of the statute. This action was proper in view of the oft-cited principle that a court should not sit as a super-legislature to determine the wisdom, need, and propriety of legislation. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1954); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936). "Inquiry into the hidden motives which

[1] The Nonpublic Elementary and Secondary Education Act, Act of June 19, 1968, P. L. —— (Act No. 109), 24 Purdon's Pennsylvania Statutes Annotated 5601 et seq. (pocket part).

may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." *McGowen v. Maryland,* 366 U.S. 420, 425 (1960). Thus, when the plain meaning of a statute is clear, a court need not consider legislative intent as that intent might be embodied in legislative history.

The District Court also properly decided the constitutionality of the Act solely as a matter of law rather than considering whether the Act might be unconstitutionally applied in some isolated instances.[2] A three-judge District Court, convened in accordance with 28 U.S.C. 2281, 2284, should declare a state statute to be unconstitutional only when it has state-wide application and by its express terms or necessary operative effect violates the Federal Constitution. *Ex Parte Collins,* 277 U.S. 565 (1927); *Ex Parte Bransford,* 310 U.S. 354, 361 (1940); *Swift & Co. v. Wickham,* 382 U.S. 111, 128 (1965).

This requirement that a three-judge District Court should only consider questions of general constitutionality is based upon sound policy considerations. To avoid a serious drain upon the federal judicial system, principles of efficient operation dictate that all questions of possible unconstitutional applications of state statutes should be remanded to a single District Court judge. See generally *Phillips v. United States,* 312 U.S. 246 (1941); *Landry v. Daley,* 288 F. Supp. 194 (N.D. Ill. 1968), *appeal dismissed, Landry v. Boyle,* 393 U.S. 220 (1969). This is emphasized by

[2] Because no plaintiff had standing to challenge the Act on Equal Protection grounds, the court did not decide the Fourteenth Amendment issues raised by the plaintiffs.

considering the consequences of a contrary approach under this Act. Approximately twelve hundred schools have entered into contracts pursuant to this statute. The general constitutionality of a statute of this nature cannot be determined on the basis of its possible maladministration with respect to certain recipients. Thus, appellants in invoking the equal protection principle have requested a three-judge District Court to decide evidentiary questions which should be resolved by a single District Court judge.

II. The Decisions of This Court Support the Determination of the District Court That the Act Does Not Violate the First Amendment as a Matter of Law

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The District Court expressly considered "whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion." (Appendix to Appellants' Jurisdictional Statement at 12). The Court did not decide this question as an abstract matter. On the contrary, the court's opinion reflects the extensive review of pertinent Supreme Court cases relating to the First Amendment. On the basis of their exhaustive study, the court concluded that as a matter of law the Pennsylvania Education Act does not violate the First Amendment. The appellees-state officials therefore submit that the First Amendment arguments raised by Appellants in their Jurisdictional Statement are so unsubstantial as not to warrant further argument.

The court concluded that because of the narrowly proscribed purposes for which the public funds could be used,[3] the purpose and primary effect of this Act is to aid the secular function of private schools. Accordingly, the Pennsylvania Education Act on its face conforms in all respects with the tests formulated by this Court in *Everson v. Board of Education,* 330 U.S. 1 (1947); and *Board of Education v. Allen,* 392 U.S. 236 (1968).

A comparison of the Pennsylvania Public Education Act with the statute in *Allen v. Board of Education,* supra, convincingly demonstrates that the purpose and effect of both acts are substantially similar. In *Allen,* this Court held that a New York statute authorizing loans of textbooks to students attending parochial schools was not violative of the establishment clause of the First Amendment. Despite the fact that public funds were irrevocably committed in providing the tools of education for parochial schools, this Court found, "that the processes of secular and religious training are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion". *Allen,* supra at 248. Although public funds are also irrevocably committed to parochial schools pursuant to the Pennsylvania Education Act, expenditures under the act serve the same secular purpose as those in *Allen* by providing textbooks, teachers' salaries and in-

[3] The Education Act authorizes the Commonwealth to contract only for services connected with the function of educating Pennsylvania's school children in the secular subjects of mathematics, physical sciences, modern foreign languages, and physical education.

instructional materials in the secular subjects of mathematics, physical sciences, modern foreign languages, and physical education. The significant fact in both cases is that public funds are being used solely for the purpose of providing secular educational services to nonpublic schools.

Although no one can seriously dispute that the Establishment Clause prohibits the states from setting up a church or supporting the religious activities of sectarian institutions, it has been conclusively determined that a state may not exclude religions from the benefits of public welfare legislation and must be neutral in its relations with groups of religious believers and nonbelievers. *Everson*, supra at 15-18. Moreover, in ascertaining neutrality, the test of this Court is:

> ". . . what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School District v. Schempp*, 374 U.S. 203, 222 (1962).

In applying that test to the instant case, the District Court concluded that the purpose and primary effect of the Pennsylvania Education Act is secular and that any incidental benefit to religion is "not sufficient to infringe upon the nonestablishment prin-

ciple of the First Amendment." (Appendix to Appellants' Jurisdictional Statement at 21.)

Moreover, "the fact that a State law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a Legislature has erroneously appraised the public need." *Everson,* supra at 6. Thus, "a state may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment." (Appendix to Appellants' Jurisdictional Statement at 17.)

The Pennsylvania Legislature, in its wisdom, has determined that this Act will better provide for the secular education of Pennsylvania's children in nonpublic schools. This goal is consistent with the pronouncement in *Allen v. State Board of Education,* 392 U.S. 236, 247 (1968) that: ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . parochial schools are performing, in addition to their sectarian function, the task of secular education."

Having decided that the purpose and primary effect of the Act is secular and does not advance or support religion, the court below necessarily held that the plaintiffs' challenge based upon the Free Exercise Clause of the First Amendment was without substance. As a matter of law, the plaintiffs have failed to show "the coercive effect of the enactment

as it operates against them in the practice of their religion". See *Abington School District v. Schempp*, supra, at 223 (1963).

In view of the thorough examination of the First Amendment issue below, it is apparent that no further argument is necessary. A reading of the lengthy and well-reasoned opinion of the District Court clearly demonstrates that appellants' allegation that the Pennsylvania Education Act violates the First Amendment to the United States Constitution is wholly without merit.

III. The General Constitutionality of a Statute Cannot Be Determined on the Basis of Its Speculative Impact Upon Certain Parties

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In addition to their challenge to the Pennsylvania Education Act on First Amendment grounds, the appellants contend that the Act violates the equal protection clause of the Fourteenth Amendment.

The District Court properly ruled that none of the plaintiffs (appellants herein) proved the requisite standing as that concept is interpreted in *Flast v. Cohen*, 392 U.S. 83 (1968). Because no appellant ever alleged that he was personally affected "by any alleged intentional or de facto segregation in these schools", the District Court summarily declined to decide the Fourteenth Amendment issue. "Standing requires at least that the plaintiff himself be personally affected." (Appendix to Appellants' Jurisdic-

tional Statement at 10, 11, citing *Flast v. Cohen,* supra at p. 110, and *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). Nevertheless, despite the absence of a proper plaintiff below, the appellants persist in raising their Fourteenth Amendment challenge here.

Even if this Court were to consider that issue, the pleadings compel the conclusion that this statute on its face does not violate the equal protection clause. In the first place, every state statute carries with it a presumption of constitutionality. *Salsburg v. State of Maryland,* 346 U.S. 545 (1954); *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U.S. 96 (1899). Moreover, it must be assumed that the Commonwealth grounded its law on some rational basis within the knowledge and experience of legislators, even though some discrimination could eventually flow therefrom. *Metropolitan Casualty Insurance Co. of New York v. Brownell,* 294 U.S. 580 (1935). Thus, "state legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it". *McGowan v. Maryland,* 366 U.S. 420, 425 (1960). It is further presumed that the public officials charged with administering a state statute are acting properly and applying the law in a constitutional manner. *United States v. Chemical Foundation,* 272 U.S. 1 (1926).

A reading of this statute demonstrates that the Pennsylvania Legislature has acted within its constitutional limitations There is no basis for even an inference that, as a matter of law, the Act excludes

from admission or otherwise discriminates against persons by reason of race. By adding the Fourteenth Amendment issue to the First Amendment challenge, the appellants are asking the Court to speculate that the Act might some day produce some form of discrimination. But the basic issue for adjudication is not whether the Act might be administered in an unconstitutional manner because the possibility or probability of such maladministration cannot nullify a statute. Otherwise, no statute could ever withstand a constitutional challenge on equal protection grounds.

CONCLUSION

Appellees respectfully submit that the issues upon which this cause depend are so unsubstantial as not to warrant further argument. Appellees therefore respectfully move the Court to dismiss this Appeal or to affirm the judgment entered in the cause by the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1199~~ 89

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1189

ALTON J. LEMON, ET AL., *Appellants*,

v.

DAVID H. KURTZMAN, ET AL., *Appellees*.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellees, Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacobs Schools of Philadelphia, Philadelphia Montgomery Christian Academy, St. Anthony's School, and Holy Ghost School, move to dismiss this appeal, or, in the alternative, to affirm the judg-

ment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

I. STATEMENT OF THE CASE

A. The Statute Involved

As revealed in the legislative findings, one out of every five elementary and secondary school pupils in Pennsylvania attends a nonpublic school. There are eleven hundred eighty-one nonpublic schools in the state which are now under contract with the Commonwealth pursuant to Act 109 of 1968 (Pennsylvania Nonpublic Elementary and Secondary Education Act), the enactment here challenged. Located in 55 of Pennsylvania's 67 counties, they have a total pupil population of 535,215 children.

Both in the title to the Act and in the statement of legislative findings and declaration of policy, the General Assembly set forth its purposes in enacting the legislation. In these it stressed (a) the educational need of individual children (b) the contribution of private schools in the face of the general educational crisis. The General Assembly specifically declared that the Act is legislation

> "to promote the welfare of the people of the Commonwealth of Pennsylvania" and "to promote the secular education of children . . . attending nonpublic schools", (Sec. 5601)

and that

> "the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives

> achieved through nonpublic education", (Sec. 5602(3))

further that

> "hazard to the education of children [occasioned by the overall education crisis] may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools". (Sec. 5602(6)).

The Act provides that the Commonwealth may enter into contracts with nonpublic schools for reimbursement to them of the actual cost of "secular educational service" consisting of instruction solely in the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. A "nonpublic school" is defined to mean a school, other than a public school, wherein a resident of Pennsylvania may legally fulfill the requirements of the Pennsylvania compulsory attendance law. "Secular educational service" is defined to mean "the providing of instruction in a secular subject", while "secular subject" is defined as follows:

> ". . . any course which is presented by the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect".[1]

"Actual cost" comprises three items of such service: textbooks, instructional materials, and teachers' salaries. Following the established pattern of govern-

[1] This critically important provision is omitted from discussion in the Jurisdictional Statement and even from quotation or reference in the dissenting opinion below.

mental reimbursement in purchase of other welfare services,[2] payment is made under terms specified by the Commonwealth, pursuant to official contract forms.

The Act imposes explicit controls in three essential aspects: (1) secularity controls (limitation to the four markedly non-value related subjects, along with the definition of "secular subject", which, as noted, excludes any religious teaching or exercise of the "sectarian function")[3] (2) quality controls, *viz.*, the requirements (Section 4604) of (a) state approval of the textbooks in question (b) state-approved standardized testing (c) teacher certification (3) fiscal controls. Section 7(a) provides:

> "Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of *separate funds and accounts* pertaining to the cost of secular educational service, as to *establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement.* Such accounts shall be subject to audit by the Auditor General." (Emphasis supplied.)

The funding of the Act is exclusively from sources which are not, and have never been, utilized for support of the public schools. Section 5606 expressly prohibits using money raised for the support of the public schools in the Commonwealth to pay for services under

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[2] See, *e.g.*, Schade v. Allegheny County Inst. Dist., 386 Pa. 507 (1956).

[3] The phrase is taken from Board of Education v. Allen, 392 U.S. 236, 248 (1968).

the Act, or even for expenses in connection with administration of the Act.[4]

The extensive Rules and Regulations[5] issued by the Department of Public Instruction in December, 1968, to implement the Act, further elaborate the aforementioned secularity, quality and fiscal controls.

On July 1, 1968, this Act became effective. The first services under the Act were rendered commencing in September of that year. In the Fall of 1970 this program will enter upon its third year of operation.

B. The Proceedings Below

On June 3, 1969, Plaintiffs (Appellants here) brought this action, naming as defendants the Commonwealth Secretary of Education,[6] the Commonwealth Treasurer and seven nonpublic schools. The action was brought as a class action, the named schools being sued as representative of (1) all sectarian educational institutions in the Commonwealth of Pennsylvania (2) all educational institutions in Pennsylvania which (allegedly) discriminate against persons by reasons of race or religion, "the number of such sectarian and

---

[4] Since the Act provides for reimbursement, no question can arise as to any "unrestricted" use by the nonpublic school of the state payment (*Cf.*, Jurisdictional Statement, 10), nor any "designating the portions of its curriculum for which it wants assistance". (*Cf.*, dissenting opinion, Lemon v. Kurtzman, — F. Supp. —, — (E.D. Pa. 1969).

[5] RULES AND REGULATIONS FOR IMPLEMENTING THE PENNSYLVANIA NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT. These were before the court below, at its own request as well as by stipulation of counsel. For the convenience of the Court, counsel have supplied official copies of these to the Clerk of the Court.

[6] The title, prior to July 23, 1969, was "Superintendent of Public Instruction".

other educational institutions being too numerous to be conveniently joined as defendants in this suit".

The Complaint alleged in three counts that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution, and prayed for a judgment to that effect. It also sought to enjoin payments under the Act and requested the convening of a three-judge court.

On July 25, 1969, defendant schools (Appellees here) filed the following motions material to a disposition of this appeal: (1) Motion Under Rule 23(c) (2) Motion to Dismiss Complaint For Failure of Plaintiffs to have Standing to Sue, and (3) Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted. The court granted leave to the Pennsylvania Association of Independent Schools to intervene as a party defendant for purposes of presenting argument on the Defendants' Motion to Dismiss.

In their motion under Rule 23(c) defendant schools sought a hearing and a determination that the seven named defendant schools were not representative of the 1,181 nonpublic schools participating under the Act. Ten days later, on August 5, 1969, Plaintiffs filed their Answer to Defendants' Motion Under Rule 23(c), stating:

> "Plaintiff(s) agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure."

Accordingly, on August 20, 1969, the court entered the following order:

> "4. In the light of plaintiffs' 'Answer to Defendants' Motion under Rule 23(c)', IT IS FUR-

THER ORDERED (a) that the within action shall not be maintained as a class action . . ."

Notwithstanding the foregoing, Plaintiffs subsequently insisted that their action was an attack upon the validity of the Act in relation to *all* religiously affiliated schools in the Commonwealth and was not confined to the seven defendant schools. See Plaintiffs' Memorandum on the Necessity of a Three-Judge Court, filed October 1, 1969, page 2; Transcript of Oral Argument, October 13, 1969, page 87. Thus, in legal effect, Plaintiffs delimited their claim to one of unconstitutionality of the statute as to all religiously affiliated schools and not with regard to any particular practice in any identified schools.

Following submission by the parties of extensive briefs and subsequent oral argument, the three-judge court ruled on the motions to dismiss for want of standing and for failure to state a claim. Other motions before the court were not reached.

As to the motion on standing: it was ruled that:

(a) None of the organizational Plaintiffs had standing to sue under any of the asserted causes of action. This was without dissent.

(b) None of the individual Plaintiffs had standing to sue under the Equal Protection Clause, since none alleged any discriminatory statutory classification, policy, or practice of which he or she was the object. This was without dissent.

(c) Only one of the individual Plaintiffs (Lemon) had standing under the Establishment Clause. This was without dissent.

(d) All individual Plaintiffs had standing under the Free Exercise Clause. One judge dissented.

As to the motion to dismiss for failure to state a claim, the issues were thus narrowed to the Establishment and Free Exercise questions. Respecting the Establishment question the court stated the issue to be: "whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion". — F. Supp. — (E.D. Pa. 1969).

Applying the test laid down in *Board of Education* v. *Allen,* 391 U.S. 236, 242, 243 (1968), the court stated that the purpose of the Pennsylvania Act "can be found clearly on its face". The court referred expressly to those provisions of the Act in which the General Assembly articulated the secular legislative purposes of the Act as well as the specific legislative findings upon which those purposes were founded. The court granted Defendants' motion to dismiss for failure to state a claim, under the Free Exercise and Establishment Clauses. As to the Free Exercise claim, the court stated that, since the Act does not advance or support religion, it does not constitute compulsory taxation for the support of religion. Further the court stated that there was "no allegation in the plaintiffs' complaint as to what their particular religious beliefs are nor how the Education Act coerces them in the practice of their religion". *Id.* at ———.

As to the Establishment claim, the court likewise found it to be without merit. The court based its conclusions squarely upon the decision of the Supreme Court in *Board of Education* v. *Allen:*

> "We recognize that 'private education . . . is playing a significant and valuable role in raising na-

tional levels of knowledge, competence, and experience', 392 U.S. at 247, and that the public's reliance on private education is being provided in these schools. We further recognize, as did the Supreme Court in *Allen,* that the 'State's interest in education may be sufficiently served by reliance *on the secular teachings which accompany religious training'* in nonpublic schools. 392 U.S. at 245. Furthermore, we consider that 'religious schools pursue two goals, religious instruction and secular education', 392 U.S. at 245, and we believe that the State may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Education Act on its face authorizes the Commonwealth to contract only for services connected with the *strictly secular* function of educating Pennsylvania's school children in the secular subjects of mathematics, physical sciences, modern foreign language, and physical education. That the Commonwealth must not be involved in the religious functions of sectarian educational institutions is clearly established by the nature and kind of strictly secular subjects selected in the statute itself and the controls and restrictions placed upon the statute's operation by the regulations promulgated thereunder. Thus limited and restricted we cannot hold that the statute advances religion either in purpose or primary effect. Moreover, the statute applies to *all* nonpublic schools both sectarian and nonsectarian. As it may apply to sectarian institutions, we concur with the Supreme Court's statement in *Allen,* supra, that *'we cannot agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in

the teaching of religion'. (Emphasis added.) 392 U.S. at 248." *Id.* at ———.

* * *

". . . the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. The statute is further limited and confined to the purchase of services at cost. Unlike *Schempp* and *Engel* the statute here maintains a position of complete *religious* neutrality. In *Zorach* v. *Clauson*, 343 U.S. 306, the Court approved the State's encouragement of 'religious instruction' and its cooperation 'with religious authorities'. Here the Education Act does not go so far as to encourage the teaching of religious matter. We recognize that the separation of Church and State embodied in the nonestablishment principle is not a self-defining concept. The increasing national concern for education in our society, coupled with the public awareness that private schools are performing a significant public service in educating great numbers of school-age children, necessarily makes the State interested in private education." *Id.* at ———.

With regard to the fact that reimbursement payments under the Act go formally to schools, and not to the individual children, the court deemed that circumstance to be insubstantial:

"Nor do we find persuasive the argument that the child must be the direct beneficiary of government funds which support secular education. Such an approach would place form over substance in that a constitutional result would depend upon minute distinctions and technicalities. The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct

payment or loan to him or to his parents or to his school or teachers. In our view the constitutional result should not and cannot wholly depend upon the identity of the payee. The use to which the funds are put must be the primary concern." *Id.* at ———.

The dissenting judge, stating that no Plaintiffs had standing under either the Equal Protection or Free Exercise Clauses, confined his opinion to the Establishment Clause and considered the Act to be in violation thereof. He acknowledged that "the Establishment Clause . . . does not preclude the state from providing any assistance, no matter how indirect, to religious institutions". *Id.* at ———. He nevertheless condemned the assistance to education provided for by the Act, on the basis that the Act involves "direct public financing". Secondly, he stated that the subjective motivation of the founders of Pennsylvania's parochial schools rendered the primary purpose of the Act "religious". Thirdly, he held unnecessary any inquiry as to whether any course given in a parochial school is secular in content and in manner of teaching, stating that the place of the teaching program and the subjective motivation of the parochial school administrators are the crucial constitutional considerations.[7]

Finally, relying upon the dissent of Mr. Justice Douglas in *Allen,* the dissent considered the Act to require the state to intrude offensively upon religious matters.

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[7] "The crucial consideration is that the total teaching program is offered in *a separate religious environment* and *for the better achievement of appropriate religious objectives.*" *Id.* at —. (Emphasis supplied.)

II. QUESTIONS PRESENTED

This appeal raises the following questions:

1. Do the organizational Appellants have a requisite personal stake or interest in the outcome of this controversy to confer standing upon them to bring this action?

2. Do the Appellants Reardon and Worrell, who are not affected taxpayers or parents of affected school children, have standing to bring this action?

3. Does the Appellant Lemon, who is not within the class of persons affected by the Act nor the object of any discriminatory practice thereunder, have standing to challenge the Act under the Equal Protection Clause?

4. Does the Act violate the Establishment Clause?

5. Does the Act violate the Free Exercise Clause?

III. ARGUMENT

A. Preliminary Questions

The Jurisdictional Statement recites eight questions (Pages 4-6). Subsequently, however, at Page 15, Appellants raise procedural questions which are not embraced by the section entitled "Questions Presented". Under the established practice of this Court, these additional questions are not properly raised and thus are not grounds for entertaining review. See, STERN & GRESSMAN, SUPREME COURT PRACTICE, 298, 352 (4th ed.). These collaterally raised questions involve: (1) the propriety of dismissing the Complaint upon motion to dismiss, (2) the claimed necessity for discovery and trial, and (3) whether the court below was justified in construing the statute without attempting to

"take judicial notice of the official Committee proceedings, transcripts, reports and journals of the House and Senate of Pennsylvania, and the regulations and application forms promulgated by the Superintendent of Public Instruction[8] . . ." (Jurisdictional Statement, 15).

(1) The Propriety of Dismissal of Plaintiffs' Complaint Under Rule 12(b)(6). Appellants urge as a "substantial question", the propriety of dismissing the Complaint under Rule 12(b)(6). The time-honored rule that only well-pleaded facts are admitted on motion to dismiss is challenged by Appellants as a radical departure from accepted standards. A long procession of cases commencing in the early common law has insulated the rule from attack, and belies Appellants' assertion. In judging the sufficiency of the Complaint, as a matter of law, the District Court followed the classic formula:

> "A motion to dismiss is the usual and proper method of testing the legal sufficiency of the Complaint. For the purposes of the motion, the well-pleaded material allegations in the Complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." 2A MOORE'S FEDERAL PRACTICE ¶ 12.08 (1968).

See, *e.g., Ward* v. *Hudnell,* 366 F. 2d 247 (5th Cir. 1966); *Homan Mfg.* v. *Russo,* 233 F.2d 547 (7th Cir. 1956); and *Le Clair* v. *Swift,* 76 F. Supp. 729 (E.D. Wis. 1948) (adding that general conclusions of fact do not rebut the presumption of constitutionality of state action).

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[8] The regulations (including the application forms) were, in fact, before the court at its own request, as well as by stipulation of counsel, and they are part of the record herein.

Appellants charge the court below with arbitrarily rejecting their characterization of the statute as one which, by purpose and effect, advances and aids religion. Yet, by so pleading, Appellants sought to foreclose examination of the statute's purpose and effect. Appellants would parade this allegation under the heading of "facts", but that the statute aids religion is clearly a legal conclusion. This averment amounts to no more than pleading that the statute is unconstitutional. Surely, Appellants are in error in implying that once a complainant characterizes a statute as "unconstitutional" or, for that matter, a document as a "contract", courts are barred by such conclusions from examining the legal consequences of the statute or document. Thus, Appellants' conclusory allegations were properly ignored by the District Court which made an extensive examination of the purpose and effect of the statute and concluded that it was constitutional.

Having so concluded, the Court decided that, under *Allen,* there was simply no law to support Appellants' claims of unconstitutionality. Hence the District Court followed one of the best recognized uses of a motion to dismiss. See *De Loach* v. *Crowley's Inc.,* 128 F. 2d 378 (5th Cir. 1942). Since it is possible to make a determination of constitutionality, under a Rule 12(b)(6) motion,[9] Appellants' urgings for discovery and offers to prove various facts (Jurisdictional Statement, Page 16) can serve no useful function; the purpose and effect of the statute are clear.

(2) The Claimed Necessity for Discovery and Trial. Appellants voice a supposed grievance that alleged

[9] See, *e.g.*, Kirk v. Boehm, 216 F. Supp. 952 (E.D. Pa. 1963) affd. 376 U.S. 512 (1964) (this Court granting motion to affirm); Baker v. Carr, 369 U.S. 186 (1962).

fact issues raise the need for a trial. (Jurisdictional Statement, Page 15). The full answer to this contention requires an explanation of the confusion created by ambiguities in the Complaint, and by the Appellants' ambivalent usage of the term "as applied". Fortunately, this confusion was clarified in the court below prior to the disposition of the motion to dismiss.

The Complaint initially attacked the Act "as applied" without specifying whether the claims of misapplication related to: (a) the manner of the execution of the Act by state officials, or (b) alleged disqualifying practices of certain schools, or (c) all church-related schools, as a class, because they also teach religion.

Official misapplication is not suggested by the Complaint.[10] The second basis—the possibility of disqualifying practices— was readily eliminated from the case by the Appellants themselves. Following Appellees' Rule 23(c) Motion challenging the class-action averment, the Appellants agreed that the action should not proceed as a class action: which meant that the practices of the seven named schools were not deemed representative of practices in all the 1,181 schools under contract. The court below entered a Pre-Trial Order to that effect. (See Pages 6-7 above).

After eliminating the class aspect of the action, the Appellants contended that their Complaint attacked the statute as applied to all church-related schools as a group. Thus, in response to the court's request for a

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[10] Appellants later disavowed this basis of attack, stating: "Obviously we are not concerned here with the improper exercise of authority in a particular case where the action purports to rest on an otherwise constitutional foundation." Memorandum of Plaintiffs on the Necessity of a Three Judge Court, filed October 1, 1969, pp. 2-4.

memorandum from counsel on the need or propriety of a three-judge court in the event the statute were deemed facially constitutional, Appellants' counsel set forth their position:

> ". . . let us say this: *the Act is unconstitutional in every application throughout the sixty-seven counties of Pennsylvania,* excepting only the possibility that some nonpublic school can be produced which (a) is non-church related, and [other conditions not here pertinent]
>
> * * * * * *
>
> "The fact that particular grants are enumerated in the Complaint as instances of unconstitutionality does not narrow the claim that the statute in its entirety is invalid. *Certainly it would be a strained misreading of the Complaint to in any way construe it as limited to a particular grant to a particular school or class of schools or to anything less than an attack on the entire statutory scheme. . . . .* In this case *the foundation itself, the underlying statute, by which taxpayer funds are sought to be given to sectarian institutions is claimed to be invalid* and the 'doom' of that foundation on a statewide basis is the obvious objective of the present case." (Emphasis supplied) Memorandum of Plaintiffs on the Necessity of a Three Judge Court, filed October 1, 1969, pp. 2-4.

And at oral argument on the Motion to Dismiss, Appellants' counsel declared:

> "*I am not saying,* and I think I have made this clear, that *this Act is only unconstitutional as to these defendant schools.* I am talking about it being unconstitutional in its entire purpose, thrust and effect." Transcript of Oral Argument, October 13, 1969, p. 87 (Emphasis supplied).

Paragraphs 18, 19, and 20 of the Complaint do not charge that the Act is unconstitutional as applied to

the seven Appellee schools, but "as applied" generally. (For example, Paragraph 18 refers not to the Appellee schools, but to "sectarian schools".) Furthermore, the prayer for relief in the Complaint is addressed not to the Appellee schools, but requests total nullification of the statute.

In view of the foregoing, the court below properly interpreted the words, "as applied", to mean that Appellants challenged the statute both on its face and *universally* "as applied" to all church-related schools. It is church-relationship and the teaching of religious as well as secular subjects, not any specific practices of any given schools, which Appellants allege to be the "doom" of the statute.

Taking the Appellants' attack at face value—as expressed by the Complaint, by the withdrawal of the class action, by the oral and written argument of Appellants' counsel, and by the insistence upon the necessity of a three-judge court—the court below properly disposed of the action without requiring a trial that was obviously unnecessary. For the suit challenged the statute "in its necessary effect"—a position with which the dissenting judge did not disagree.

Having mounted their theory of total constitutional nullification, *solely upon allegations of church-relatedness and religious instruction* (allegations that were admitted by the Motion to Dismiss), there can be no need for trial or discovery relating to actual practices in any of the seven Appellee schools.

The Complaint (Paragraph 13) alleges that the Act applies to sectarian schools which teach religion; and all counsel and judges agreed that the overwhelming majority of schools covered by the Act fall into that

category. With these foundation facts admitted, the Appellants' theory of unconstitutionality "as applied" becomes solely a question of law. No additional facts derived from discovery or at trial can resolve this legal issue.

Appellees acknowledge that the disposition by the court below does not preclude any qualified plaintiff from raising a constitutional challenge to the Act "as applied" with reference to specific schools, based upon their respective particular activities peculiar to them.

(3) The Determination of the Legislative Intent. The court below found the purpose of the Act clearly expressed within the four corners of the Act: a plan to promote secular education in nonpublic schools. See Pages 2-5 (*supra*). Accordingly it refused to reexamine the legislative history. Appellants have not claimed the language of the Act to be in any respect *ambiguous* (thus necessitating resort to the legislative background for purposes of clarification). Rather, Appellants ask this Court to hold that the General Assembly was guilty of *deception*, or a sham, in falsely expressing its actual purpose in enacting the legislation. This Court has already precluded excursions into legislators' motivations:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: 'The decisions of this court from the beginning lend no support whatever to the assumption that this judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused this power to be exerted.' McCray v. United States, 195 U.S. 27, 56 (1904)." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

B. This Appeal Presents No Substantial Federal Question

(1) The Asserted Standing of the Organizational Appellants Does Not Present a Substantial Federal Question. The court below ruled (without dissent) that none of the six organizational Appellants had standing to sue. The Complaint did not allege that the organizational Appellants sued as taxpayers, or as representing taxpayers or members, or that the Act in any way dealt with the status, purpose, assets, or activities of these organizations. The Complaint was content with the general allegation that the organizations shared "common objectives".

In light of the well settled principles expounded by this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), it is clear that the organizational Appellants have failed to assert any "personal stake in the outcome of the controversy", or organizational "injury in fact". *Assn. of Data Processing Service Organizations, Inc.* v. *Camp*, — U.S. — (1970); 38 U.S. Law Week 4193 (March 3, 1970). They appear to rely solely upon the discredited "private attorney general", or "public action", theory."

(2) The Asserted Standing of the Appellants Reardon, Worrell and Lemon Does Not Present a Substantial Federal Question. The court below (without dissent) denied standing to sue to all three individual Appellants under the Equal Protection Clause, and to Appellants, Reardon and Worrell, under the Establishment Clause, on principles firmly established by this Court. *Flast* v. *Cohen, supra; Camp, supra.*

(a) Establishment and Equal Protection. With respect to the Establishment Clause, the court pointed

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[11] See, Doremus v. Board of Education, 342 U.S. 429, 431 (1953); Davis *Standing: Taxpayers and Others*, 35 U. of Chi. L. Rev. 601 (1968).

out that the Complaint makes no allegation that Reardon or Worrell paid any of the admissions taxes which constitute the sole source of funding under the Act (Section 5606). Hence they could not qualify as "affected taxpayers" having any "personal stake" in the outcome of the controversy. As this Court has recently reiterated: "The first question is whether plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Camp, supra.*

With respect to the Equal Protection Clause, the court found no allegation that Reardon or Worrell have any relationship to any school child; there was only the allegation that Lemon is a Negro parent of a *public* school child. As the court below stated: "... there is no allegation . . . that Lemon or his child is personally affected by any alleged discrimination . . . in these [nonpublic] schools" nor any allegations "which assert that Lemon's child . . . was denied admission [to such school] because of race or religion." *Lemon* v. *Kurtzman,* — F. Supp. —, — (1969). Absent any allegation that Lemon or his child were the object of alleged discriminatory practices, Lemon was properly held to lack standing to assert an Equal Protection challenge to the Act.[12]

(b) Free Exercise. For reasons not clear to Appellees, the Appellants attack the ruling favorable to them below, namely, that the individual Appellants had standing to assert Free Exercise claims. (See "Questions Presented", No. 3). While this issue is not central to the disposition of this appeal, Appellees must deny that the Complaint establishes any such standing.

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[12] While the Jurisdictional Statement attempts to raise substantive Equal Protection questions, such issues are not before this Court, since they were not reached by the District Court.

It alleges no facts to show what, if any, religious beliefs are held by the individual Appellants or how the Act might be deemed to coerce them in the practice of their religion. Only Lemon paid a tax covered by the Act. This case is, therefore, controlled by the ruling in *McGowan* v. *Maryland,* 366 U.S. 420 (1961) wherein this Court denied Free Exercise standing to the plaintiffs, with the following declaration:

> "But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedom due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are." *Id.* at 429.

Therefore, since no Appellant has Free Exercise standing, this Court should not consider the substantive Free Exercise question raised by this appeal.

(3) The Appeal Presents No Substantial Federal Question Under the Establishment Clause. The Establishment question raised by this appeal is rendered insubstantial by the clear and governing compass of the recent decision in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). All judges below and all the parties to the case have asserted the common conclusion that the *Allen* test of constitutionality [13] is here controlling.

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[13] "Based on Everson, Zorach, McGowan, and other cases, Abington School District v. Schempp, 374 U.S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits: 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education.' 374 U.S. at 222."

(Jurisdictional Statement, Page 10). The District Court's finding that the Act has a secular legislative purpose and a primary effect that does not advance religion cannot be seriously disputed so as to raise a substantial federal question. The legislative, administrative and contract controls above explained (Pages 3-5) squarely meet the requisites and rationale of the *Allen* decision, namely, that church-related schools which also teach religion, are not, by that fact, constitutionally disqualified to receive public assistance limited to the achievement of their "secular educational function". To suggest, as do Appellants, that secularly rendered instruction in the Act's covered subjects, Mathematics, Modern Foreign Languages, Physical Science and Physical Education, do not advance society's "task of secular education" is to blink reality.

Appellants misconceive the concept of "effect" in determining the constitutionality of statutes. To find a statute unconstitutional, a court must find—not some impermissible effect in application— but that such effect is an "inevitable" effect dictated by the "necessary scope and operation" of the statutory text. *United States* v. *O'Brien,* 391 U.S. 367, 386 (1968). As the Act in question is drawn, such a finding is not possible under the controlling *Allen* decision.

The "primary effect" test of *Allen* contemplates that the chief or principal statutory effect is to advance religion. The Act provides partial reimbursement of the costs actually incurred by nonpublic schools for secular education in the covered subjects. There is no profit to the schools. Under the Act's clear provisions, not one dollar may be received by a nonpublic school except upon proof that that dollar replaces a like amount already expended by such school as the actual

cost of a secular educational service rendered to children.

The cases upholding statutory programs as having no primary effect of advancing religion are particularly instructive. *Board of Education* v. *Allen, supra; McGowan* v. *Maryland, supra; Everson* v. *Board of Education,* 330 U.S. 1 (1947). *Allen* and *Everson* respectively approved of public expenditures to supply textbooks and bus transportation to parochial school children as not advancing religion. The Court in *Everson* declared:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children *to get a secular education* serves no public purpose." 330 U.S. 1 at 7. (Emphasis supplied).

The public purpose achieved through expenditures aiding the education of parochial school children was recognized as long ago as 1930:

> "The schools . . . are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries . . . [The legislation's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370, 375 (1930).

These cases, which recognize that government may achieve secular, public-interest goals through religiously affiliated institutions, stand in sharp contrast to those cases in which government has sought to advance religious goals through public institutions:

Epperson v. *Arkansas,* 393 U.S. 97 (1968) (anti-evolution teaching); *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963) (Bible-reading and prayer); *Engel* v. *Vitale,* 370 U.S. 421 (1962) (state-sponsored prayers); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948) (sectarian instructional programs).

(4) *The Appeal Presents No Substantial Federal Question Under the Free Exercise Clause.* Even if any of the Appellants has standing under the Free Exercise Clause, it is clear nevertheless that no substantial question is presented thereunder. To state a cause of action under the Free Exercise Clause, a party must allege that the law coerces him, as an individual, in the practice of his religion. Appellants failed to allege in their Complaint what their particular religious beliefs were, or that the Act coerced them, as individuals, in the practice of their religion. This Court has said:

> " . . . 'it is necessary in a Free Exercise case for one to show the coercive effect of the enactment as it operates against him *in the practice of his religion',* Abington School Dist. v. Schempp . . . and appellants have not contended that the New York law in any way *coerces them as individuals in the practice of their religion."* (Emphasis supplied). *Board of Education* v. *Allen, supra,* 248, 249.

The allegation that the Act "constitutes compulsory taxation for the support of religion" must fail if, as under *Allen,* the primary effect of the Act does not advance religion. For, assuming, *arguendo,* that the taxation which funds this Act is compulsory, it is not for the support of religion.

CONCLUSION

Under the settled principles established by this Court in cases involving standing to sue, the Establishment Clause, and the Free Exercise Clause, it is respectfully submitted that this appeal presents no substantial federal question. The Opinion and the Judgment of the court below should be affirmed, or in the alternative, the appeal should be dismissed.

Dated March 30, 1970

Respectfully submitted,

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OPINION BELOW.

The majority and dissenting opinion of the three-judge District Court for the Eastern District of Pennsylvania is not yet reported.

The Opinions and the Order of the majority of said court dismissing the Complaint are to be found at page A78 of the Appendix.

JURISDICTION.

This suit, to enjoin the enforcement of a Pennsylvania statute as unconstitutional, was brought under 28 U. S. C. § 1343 and § 2281, and was heard by a three-judge court pursuant to 28 U. S. C. § 2284. The final decree of the three-judge court was entered on November 28, 1969; notice of appeal was filed in the District Court on December 17, 1969.

The jursdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. § 1253. The jurisdiction of the Supreme Court to review the judgment on direct appeal is sustained by the decision in *Briggs v. Elliott*, 342 U. S. 350 (1952), and is in conformity with the procedure in *Abington School Dist. v. Schempp*, 374 U. S. 203 (1963).

This Court noted probable jurisdiction on April 20, 1970.

STATUTES INVOLVED.

The statute of Pennsylvania, the constitutionality of which was challenged before the three-judge court is Appendix A to the Complaint (App. A18).

> [The Act provides that all of the proceeds from a certain tax on horse racing up to $10 million, and one-half of all proceeds in excess of $10 million, shall, under the direction of the Superintendent of Public Instruction be used for reimbursement to nonpublic schools for the purchase of "secular" educational services. "Secular" services are defined as consisting of courses in mathematics, modern foreign language, physical science and physical education and the reimbursement is limited to the actual cost to a nonpublic school of the teachers' salaries, textbooks and instructional material used in the teaching of courses in those four categories. The Act requires that the textbooks and instructional materials be approved by the Superintendent of Public Instruction, that a satisfactory level of pupil performance shall have been attained, and makes provisions respecting teacher certification in nonpublic schools. The application for reimbrsement and the payments themselves take place after the close of the year in which the teaching occurs. The Act directs that the payments be made to the schoool itself and the school accounts are made subject to audit.]

The First Amendment of the Constitution of the United States, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

The three-judge court, sustaining a motion to dismiss, declared constitutional (Hastie, C.J., dissenting) a statute which provides for direct payments of public funds to sectarian, church-administered schools. The Complaint alleged that the statute violated the religious clause of the First Amendment and the equal protection clause of the Fourteenth Amendment. The majority found that (1) none of the plaintiffs had standing to raise the alleged violation of the equal protection clause, (2) that the individual plaintiffs had standing to raise free exercise questions but the Complaint failed to state a cause of action under this clause, and that (3) as to the one plaintiff with standing to raise the question under the establishment clause, the Act was constitutional on its face and therefore the Complaint failed to state a cause of action thereunder.

The questions presented are these:

1. Do organizational appellants such as these have standing to raise issues under the First and Fourteenth Amendments?

2. Do individal appellants have standing as taxpayers to raise issues under the establishment clause if they have paid state taxes, including school taxes, but not paid the specific tax, the expenditure of the proceeds of which is alleged to violate the First and Fourteenth Amendments?

3. Do the individual appellants have standing as taxpayers, citizens, residents and parents of children in the public schools, to raise the question of violation of the free exercise clause where they allege that, contrary to their religious consciences, they are being forced by operation of the taxing power to contribute to the propagation of religion by the supporting of sectarian schools?

4. Do any of the individual appellants, one of whom is a Negro, whose children attend the public schools, have standing under the equal protection clause, where the Complaint alleges that public funds are being disbursed under the Act to schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion and which are racially segregated either by design, tradition, policy, quota, cost, residential pattern, or religious requirement, and which further alleges that the subsidy from the Commonwealth will tend to perpetuate and promote such racial discrimination?

5. Does a Complaint which alleges that public monies are being paid over directly to sectarian schools owned, controlled and administered by religious bodies under an

Act which has as its primary purpose and effect the advancement of religion by the subsidization of sectarian schools state a cause of action under the religious clause of the First Amendment?

6. Does a Complaint which alleges that public funds are being paid directly to schools which are de facto racially segregated and which by purpose or effect discriminate on the grounds of race or religion state a cause of action under the equal protection clause of the Fourteenth Amendment?

7. Does a Complaint which alleges that legislation prefers one religion state a cause of action when, on a motion to dismiss, plaintiffs offer to prove that over ninety per cent of the recipients of the state funds are organs of a particular church?

8. Does a statute which declares that due to increases in costs in the public schools and the fact that twenty per cent of the school children attend nonpublic schools (97% of which are church schools) that the closing of a majority of the nonpublic schools would constitute an intolerable financial burden on the state and therefore provides subsidy to these schools constitute a constitutionally forbidden use of religious institutions to achieve a secular purpose and create a forbidden interdependence between church and state?

STATEMENT OF THE CASE.

In April of 1968 the Committee on Basic Education of the House of Representatives of the Commonwealth of Pennsylvania held extensive hearings. As stated at the outset by the chairman of that Committee, the purpose of the hearings was "to find out if state funds can be used for aid to nonpublic schools" in view of the fact that "these school systems are in serious financial difficulty."[1] The Committee, in a series of hearings,[2] of which the official transcript totals 800 pages, proceeded to do just that: it considered (by means of receiving testimony and by staff study) all of the various known or proposed channels and devices by which state aid could be given. The result was the Nonpublic Elementary and Secondary Education Act, Act 109 of the Laws of Pennsylvania, the statute here under attack. The scheme of the Act is that, from funds derived from a tax on flat and harness racing, the Superintendent of Public Instruction of the Commonwealth of Pennsylvania is authorized to cause the Treasurer of the Commonwealth to reimburse nonpublic schools, by cash or draft, for the cost to those schools of teachers' salaries, textbooks and teaching materials in the fields of mathematics, modern foreign languages, physical science, and physical education for the preceding year. The statute itself calls this a "purchase of services" and speaks of contracts to be entered into for such services. In the words of Chief Judge Hastie, dissenting in the court below, "This phrase is not descriptive of the statutory scheme." Chief Judge Hastie's description of the process is succinct:

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1. Official transcript, pp. 3-4, opening statement of Chairman Fox, Committee on Basic Education, House of Representatives Hearing of April 3, 1968.

2. A summary of the legislative proceedings comprises the Addendum to this Brief.

"A nonpublic school that desires financial aid under the Act need do no more than submit, on a form prescribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called 'contract'. The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure for asking for aid and later proving that it has made expenditures that are reimbursable under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none." (App. A102)

Over $5 million is now being paid by the Commonwealth of Pennsylvania in installments, commencing with the first payment in September, 1969, for reimbursement for costs incurred by the nonpublic schools for the preceding academic year, 1968-69. Appellants' Complaint, which requested a three-judge court, sought a preliminary and final injunction restraining the appropriate officials of the Commonwealth from making any payments pursuant to the Act to the seven church-affiliated defendant schools, which were alleged to be typical of virtually all of the schools receiving aid. Of the pupils in nonpublic schools in Pennsylvania, 96.6% attend church-affiliated schools.[3] The Complaint alleged that the statute, on its face and as ap-

3. *Statistics on Nonpublic Elementary and Secondary Schools, 1965-1966*, Office of Education, U. S. Department of Health, Education and Welfare, OE-20111.

plied, authorized payment to sectarian educational institutions controlled by churches, having as their purpose the teaching and propagation of a particular religious faith and conducting their operations, curriculums and programs to fullfill that purpose; and further alleged that the overwhelming proportion of the recipient schools discriminated and/or were de facto segregated as to admissions and employment on the basis of race and religion.

With respect to the fact that these schools were the organs and instrumentalities of churches and religious groups, the Complaint alleged that the statute violated both the establishment and the free exercise clauses of the First Amendment and that as to the fact that the Act authorized the payment of funds to schools which discriminate on the basis of race and religion, or were segregated, violated the equal protection clause of the Fourteenth Amendment.

With respect to the violation of the religious clause of the First Amendment, the Complaint made certain specific allegations of fact. The Complaint alleged a violation of the establishment clause in that the Act provides for direct financial aid out of state funds to sectarian schools, that it finances and participates in the blending of sectarian and secular instruction, and that it has as its purpose and primary effect the advancement of religion. The free exercise clause was alleged to be violated by reason of the fact that the statute constitutes taxation for the support of religion.

The allegation of violation of the equal protection clause by reason of alleged racial and religious discrimination was based, in the Complaint, on the fact that the defendant schools and the preponderance of the other schools eligible for aid were *de facto* racially segregated in both admission of pupils and employment of teachers and administrators, such segregation arising "either by religious requirement, design, tradition, policy, quota, cost or

residential pattern." The Complaint alleged that tax aid by the Commonwealth would tend to perpetuate and promote such segregation, with the ultimate result of promoting two school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private, subsidized school system predominantly white, affluent and superior.

The Complaint was filed on June 3, 1969, together with a Motion for Preliminary Injunction and an Order for the appointment of a three-judge court. On July 7, 1969 appellants filed interrogatories and a Motion to Produce under Rule 34 upon defendant schools. All discovery was subsequently stayed pending disposition of several motions by defendants below, including motions to dismiss the Complaint for failure to state a claim and for lack of standing. On November 28, 1969, after briefs and argument, the District Court dismissed the Complaint, Chief Judge Hastie dissenting.

Appellants contend that the First Amendment is violated on a number of grounds.

In the first place, it was contended that any such payment from the Treasurer of the Commonwealth to the treasuries of sectarian, church-affiliated schools for their unrestricted use was a violation of the establishment clause, per se, under the rule of *Everson v. Board of Education*, 330 U. S. 1 (1946) forbidding any tax aid "to support any religious activities or institutions."

All parties below and the majority and dissenting judges below agreed that, if the Act were to survive the preceding point that direct tax subsidy was, per se, unconstitutional, the prime test to which the Act must then be submitted was whether the primary legislative purpose is secular *and* its primary effect one that neither advances or inhibits religion.

More particularly, it was alleged in the Complaint and contended in briefs and at oral argument that the primary legislative *purpose,* as revealed by the official legislative history, was to alleviate an alleged financial crisis of the Catholic parochial school system and thus to aid religion. This contention was, in form and in substance, made as an allegation of *fact* which appellants specifically offered to prove, after discovery, at trial.

As to the Act's primary *effect,* it was contended the Act on its face advanced religion since the Act, together with the official regulations promulgated by the Superintendent of Public Instruction (of which the Court could take judicial notice) involved a statutory scheme under which it was obvious that there was no actual purchase of services and that the Commonwealth received nothing in return for its money; and, alternatively, it was contended that discovery and trial would prove the foregoing by placing the regulations and the form of applications for the state aid formally in evidence, prove that the recipient schools were rendering no additional services and, in addition, demonstrate the all-pervading religious character and purpose of the approximately 97% of the recipient schools which are church affiliated.

It was further alleged and contended below that by reason of the fact that nine out of ten of the recipient church-related schools were Roman Catholic, the Act preferred one religion over another.

The Complaint alleged and appellants contended below that the very justification for the Act, contained in its own preamble and findings, accepted at face value, at the very least required the conclusion that the state was using religious means to further secular ends.

The Complaint also alleged and the appellants contended below that the Act on its face and as applied creates

a forbidden interdependence and fusion between religious institutions and the state. The specifics and particulars of this interdependence were offered to be put of record by the normal process of discovery and trial.

The case was originally framed as a class action, the class being the nonpublic schools in Pennsylvania which either are sectarian institutions or which, by purpose or effect, discriminate on the basis of race or religion. The class action status was dropped by the appellants and the Complaint amended to allege that the seven defendant schools were "typical" of all nonpublic schools which were church-related or which discriminated, rather than "representative" in the technical sense under Rule 23(c).

The majority below did not actually grapple with any of the above contentions nor did they at any time indicate that they felt the need for a record; the opinion simply reviews (and accepts) that preamble and factual and policy findings with which the final text of Act 109 was well-equipped.

The court, including the dissenting judge, found a lack of standing in all the plaintiffs to raise issues under the Fourteenth Amendment. These were essentially that the effect of the Act was to subsidize and perpetuate racial and religious segregation in the schools of Pennsylvania, which it was alleged were *de facto* segregated by design, tradition, policy, quota, cost, residential pattern or religious requirement. The court also decided that the organizational plaintiffs had no standing in the case at all, and that under their application of *Flast v. Cohen,* 392 U. S. 83 (1967), only the plaintiff who had purchased a ticket at the race track had standing to raise issues under the establishment clause. All of the judges agreed that the one plaintiff who had standing under the establishment clause by virtue of his ticket purchase lacked standing to raise the equal protec-

tion issue because, although a Negro and a parent of Negro children in the public schools, he did not allege that he had applied on behalf of his children for admission to any of the recipient schools. The court ignored the contention of the plaintiffs below that the Act, by reason of its subsidization and perpetuation of racial (and religious) segregation, had an adverse effect on the *public* schools which their children attended.

SUMMARY OF ARGUMENT.

As noted with specificity in the preceding Statement and with more particularity in the Argument, the Complaint made a broad range of allegations of the particulars in which the Pennsylvania Nonpublic Elementary and Secondary Education Act (generally referred to hereinafter as Act 109) violated the First and Fourteenth Amendments of the Constitution. The majority below, sustaining a motion to dismiss, did not find the Complaint defective as a matter of pleading. What the majority in the District Court did was to decide without benefit of answer, discovery, evidence or trial, that Act 109 was constitutional by simply placing before itself the Act with its declarations of purpose and findings and considering nothing else.

In so doing the court erred since (a) the Act is *per se* unconstitutional on its face and (b), since, if not, its basic concept, under which tax money is given to church institutions as a subsidy to be used by those institutions as they choose, is a scheme without precedent in American constitutional history. It therefore requires all of the invaluable setting which only the fullest development, by discovery and evidence, can provide.

By specifically refusing to consider the legislative history of the Act, the court misapplied the *primary legislative purpose* test called for by recent decisions of this Court.

By precluding discovery and the introduction of evidence, the court declined to make any inquiry whatsoever into the *primary effect* of the Act, in fact adopting the legislature's assurances, in the Act itself, that its effect was secular.

Appellants' offer to prove that 97% of the benefits of the Act were and would continue to accrue to the Catholic parochial schools and that therefore Act 109 preferred one religion over all others was totally ignored.

Likewise, the contention that the Act on its face and as justified by the Attorney General of the Commonwealth of Pennsylvania, at most, established that the legislation was an attempt to use religious means and institutions to accomplish secular ends was not dealt with in any way.

Appellants also plead in their Complaint and contended below and contend here that the scheme of the legislation and the underlying justification for it (that the state recognizes its dependence on the churches to educate one-fifth of its children and, on the other hand, that the church schools cannot continue to educate this many children of their faith unless the state subsidizes them) reveals that the Act establishes a forbidden interdependence between church and state. The majority below did not deal with this problem.

Finally, the majority below ignored what the dissenting judge perceived, namely, that the facade of the state entering into contracts for the "purchase of services" was a subterfuge in that the state does not actually receive any services for its money because the schools do not undertake any obligation whatsoever to educate any particular students or any additional students at all, the reimbursement for cost being at most the yardstick by which the amount of the monetary subsidy is measured.

As to the allegation that Act 109 violates the equal protection clause of the Fourteenth Amendment, the majority and dissenting judges below found a lack of standing in all of the appellants to raise that issue and did not, therefore, deal with the merits. Appellants contend that Alton Lemon, having alleged that he is a Negro and a parent of children in the public schools and having alleged that the effect of Act 109 will be to encourage, promulgate and perpetuate de facto segregation, to the detriment of the education received by his and other black children in the public schools, at least has that degree of *prima facie* nexus to the

complained-of unconstitutionality to survive a motion to dismiss. For only the process of discovery and trial can provide the court with the date required to adequately sift and weigh all of the circumstances so that a determination as to whether there is here such state action on behalf of segregation in education as to violate the equal protection clause.

ARGUMENT.

The Standards to Be Applied on the Sufficiency of a Complaint When Challenged by a Motion to Dismiss.

This section applies equally to the issues discussed below in "Part I—First Amendment" and "Part II—Fourteenth Amendment".

In moving to dismiss a complaint in the Federal court on grounds of failure to state a cause of action, the movant undertakes a very heavy burden indeed. Such a motion is in the nature of a general demurrer and it admits all of the well-pleaded material allegations of fact. Moore Fed. Practice, 12.08. The Complaint may not be dismissed unless it appears *to a certainty* that plaintiffs is entitled to no relief under any state of facts which could be proved in support of the claim. *Ballou v. General Electric Company*, 393 F. 2d 398 (C. A. 1st 1968).

Although it is a lower court decision, it is worth noting that a recent case in the same District Court, the Eastern District of Pennsylvania, makes the very point which should have deterred the majority below from attempting to resolve broad constitutional issues in the inevitable abstraction when the case is without a record:

> "A motion to dismiss should be approached with caution. *It should not be the vehicle for enunciating rules of law in the abstract.* Rather, if the factual situation has not crystallized, a court should await the utilization by parties of the discovery tools furnished by the Rules, followed by a motion for summary judgment under Rule 56." (italics added) *Miller v. Bargain City, U. S. A. Inc.*, 229 F. Supp. 33, 36 (E. D. Pa. 1964) (Joseph Lord, J.); accord *Melosonics Corp. v. Cropp*, 342 F. 2d 856 (3rd Cir. 1965).

Indeed, the test in Mr. Justice Holmes opinion in *Hart v. B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 274 (1923), that dismissal could not be had unless "the claim is wholly frivolous," is still used and adverted to by federal courts on motions to dismiss, e.g., *Radovich v. National Football League,* 352 U. S. 445 (1957). If constitutional attack on Act No. 109 is frivolous, it is a frivolity predicted and expected by virtually every member of the legislature of Pennsylvania who spoke on the Bill. This standard, of course, would apply to both the challenge to the legislature on the church-state issues and to that under the equal protection clause of the Fourteenth Amendment. Judge Tuttle applied the same test in a class action in a school desegregation case. *Mannings v. Board of Public Instruction,* 277 F. 2d 370 (C. A. Fifth 1960).

Furthermore, weighing the Complaint against this minimal standard, liberal construction is to be employed in its favor. *Moore, op. cit., supra,* 12.08, and cases cited.

Moreover, as far as the First Amendment aspect of the case is concerned, the usual presumption of the constitutionality of legislation is removed by the doctrine of "the preferred place given in our scheme to the great, the indispensible democratic freedoms secured by the First Amendment." *Thomas v. Collins,* 323 U. S. 516, 530 (1945).

In issues of fundamental constitutional law the Supreme Court has not found it irrelevant that the practice was one of long custom and tradition. *Walz v. Tax Commission of the City of New York,* No. 135, October Term, 1969, May 4, 1970, 38 LW 4347. Here, no one denies that the Pennsylvania scheme embodied in Act 109 is innovative and its mechanism somewhat complex. From every standpoint it would seem unwise to dispose of such a question on a motion to dismiss. Actually, in terms of the judicial process, more justification would be found for declaring such an act unconstitutional without a record than to declare it constitu-

tional, since an act unconstitutional on its face cannot be saved by evidentiary material where an act which is either constitutional on its face or of uncertain constitutionality may prove to be unconstitutional when a record is established.

The purpose of the succeeding sections of Argument is to set forth in somewhat abbreviated form material from decisions of the Supreme Court which would indicate that Act 109 necessarily raises the gravest constitutional questions and to set forth some of the factual material which appellants would undertake to prove which would create a substructure of recorded fact upon which those constitutional principles could operate.

PART I.
ACT 109 VIOLATES THE FIRST AMENDMENT.

A. The Legislation Is Unconstitutional Per Se, and on Its Face.

If the principles enunciated over the years by the Supreme Court are to be followed, the Complaint, having alleged that tax funds are to be paid over without restriction to church institutions, states a cause of action on this core allegation alone. It is not without significance, particularly in light of the comments of the Supreme Court in *Walz v. Tax Commission, supra,* that no case has ever been found in which public money was paid over to church institutions.

Two cases appear to raise the issue but were disposed of on other grounds.[4]

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4. *Cochran v. Louisiana State Board of Education,* 281 U. S. 370 (1930) involved a Louisiana statute providing for state purchase of secular textbooks for use by children attending both public and private (including parochial) schools. The statute was not attacked as a violation of the First Amendment requirement of church-state separation, since it was then generally assumed that this mandate of the First Amendment applied only to the Federal government and not to the states.

Bradfield v. Roberts, 175 U. S. 291 (1899) is not very instructive in our situation. There, the Providence Hospital in the City

In the course of deciding a number of other cases in which it was alleged that the legislative measure before the Court *indirectly* aided religious schools, the Court has oft reiterated that tax money could not be paid over to religious institutions and in each case was at pains to point out that that was not being attempted in the particular case before them.

In *Quick Bear v. Leupp,* 210 U. S. 50 (1908), the Court held that funds held for their Indian owners by the Federal government as trustee could constitutionally be disbursed to pay the cost of tuition for the Indians at private, religious schools which they desired to attend. The Court upheld the expenditures because the funds belonged to the Indians and not to the government; i.e., were not public funds. The Indians had the right to use their own money to educate their children in the schools of their own choice, even if the government could not disburse its own money to the same schools because of the First Amendment.

In *Everson v. Board of Education,* 330 U. S. 1 (1946), the Court ruled by a vote of five to four that a state (New Jersey) could constitutionally finance bus transportation of children to parochial as well as public schools. The Court

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4 (cont'd)
of Washington entered into a contract with the municipal authorities under which two isolation buildings were constructed by the Commissioners of the District on the grounds of the Hospital, under an agreement that two-thirds of the capacity of the isolation buildings was to be reserved for the use of "such poor patients as shall be sent there by the Commissioners . . ." For each patient so sent the Commissioners paid a specified rate. A suit was brought by a taxpayer of the United States and a resident of the District of Columbia, seeking an injunction on the grounds that the Providence Hospital was a private ellmosynary corporation and that "to the best of complainant's knowledge and belief it is composed of members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church; . . ." The court, however, did not actually reach the First Amendment question because they concluded that "we are not able to say that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."

found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road, it being a fact that bus transportation was safer than any other available form.

The Court at the outset made the point that "the State contributes no money to the schools. It does not support them."

The Court then said:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." 330 U. S. at 16.

Note that the Court did not limit the prohibition upon what New Jersey could do to the use of tax-raised funds to support the *teaching of* the faith of any church but rather included within the ambit of the stricture a prohibition against using "tax-raised funds to support of an institution *which teaches* the tenets and faith of any church."

There then followed the famous *Everson* exposition of the meaning of the establishment clause, which included within it the following:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S. at 16.

This same quotation appeared in the majority opinion in *McCollom v. Board of Education,* 333 U. S. 203, 1948.

In *Zorach v. Clauson,* 343 U. S. 306 (1952), the Court upheld (three justices dissenting) the constitutionality of a program of released time for religious education under which children would be released from public school for one

hour a week to receive religious instruction elsewhere, because no expenditure of public funds or use of public buildings was involved. The Court said: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education. . . ."

In *Torcaso v. Watkins,* 367 U. S. 488 (1961), which concerned an oath of office, the Court again repeated the statement made in the *Everson* and *McCollum* cases, quoted above.

In *Engle v. Vitale,* 370 U. S. 421 (1962), the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated (Emphasis supplied).

There then came the decision of the Court in *Abington School District v. Schempp,* 374 U. S. 203 (1963), which case provided an opportunity for a most exhaustive inquiry by the various members of the Court into the core meaning of the religious clause of the First Amendment, particularly as related to schools.

The holding itself is succinctly stated in the following headnote:

> "Because of the prohibition of the First Amendment against the enactment by Congress of any law 'respecting an establishment of religion,' which is made applicable to the States by the Fourteenth Amendment, no state law or school board may require that passages from the Bible be read or that the Lord's Prayer be recited in the public schools of a State at the beginning of each school day—even if individual students may be excused from attending or participating in such exercises upon written request of their parents."

On the bare holding alone it is difficult to see how the instant legislation can survive. If it is a violation of the First Amendment to merely read ten verses of the Bible in the public schools (the essence of whose "publicness" is their support by tax funds), an event from which children may be excused, how can tax funds be appropriated to schools whose entire raison d'etre is religious and in which religious instruction, symbols, readings, and ceremonies abound![5] *Board of Education v. Allen*, 392 U. S. 236 (1968) followed. Its holding is discussed below, but again, in sustaining the loan of textbooks to all school children, including those attending parochial schools, it was emphasized that the *school* received nothing. It stayed well over on the "child benefit" side of the line.

It must be borne in mind that here the tax money is paid to the general treasuries of the church institutions; the cost of "secular services" are, at most, merely a means of measuring the amounts each institution receives.

If these principles, steadfastly repeated by the Supreme Court, mean what they say, the Pennsylvania legislation is

5. One of the effects of Act 109 is to render the schools receiving aid thereunder public schools, at least *pro tanto*. The Attorney General recognized this fact in his brief in the court below since he justified the legislation on the grounds that it is a means selected by the legislature to satisfy a mandate of the Constitution of Pennsylvania (p. 8, et seq.). The constitutional provision in question requires the General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education . . ." To the extent that the Court were to accept the Attorney General's argument that Act 109 is pursuant to Article III, § 14 of the Pennsylvania Constitution (the Article above quoted), *Schempp* would compel a holding that Act 109 is unconstitutional. The dilemma of the Commonwealth is plain: on the one hand the legislature must be found to have had a secular purpose and one within their powers, and the Commonwealth attempts to satisfy these requirements by pointing to Article III, § 14; but that directs the maintenance of "public" education and at that point *Schempp* operates to clearly require that all religious ceremonies or observances of any kind whatever in the defendant schools be eliminated. An amendment to so provide was offered in the Senate and was defeated. *Legislative Journal—Senate*, June 12, 1968, p. 377.

nconstitutional on its face, irrespective on the one hand of hat mechanical device is employed to channel or measure he extent of the public funds, and irrespective on the other and, of the specific unconstitutional features discussed be-ow. On this core concept of the Pennsylvania Act plaintiffs oncede that no discovery is required and since the Act lainly states that tax funds are to be paid to nonpublic chools for nothing other than doing what their faith man-ates they should do (over nine out of ten being church-ffiliated) and which they have been doing, this Court, at his juncture, even on this record (the statute being before hem) has grounds for declaring the Pennsylvania Act un-onstitutional.

At the very least litigation challenging a state law nder which public funds are paid directly to the treasuries religious institutions should be tried, not dismissed. The wer court did not deal with this point.

B. The Test.

All parties and the majority and dissenting judges low agreed that, if the Act were to survive the preceding int that direct tax subsidy was, per se, unconstitutional, e prime test to which the Act must then be submitted was at originally formulated by Chief Justice Warren in *cGowan v. Maryland*, 366 U. S. 420 (1960), and repeated d developed in *Abington School Dist. v. Schempp, supra*, d *Bd. of Education v. Allen*, 392 U. S. 236 (1968); namely, ether the primary legislative purpose is secular *and* primary effect one that neither advances or inhibits igion.

The test was originally formulated by Chief Justice arren in the *McGowan* case as follows:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment Clause' if it can

be demonstrated that its purpose—evidenced either on the face of the legislation, *in conjunction with its legislative history*, or in its operative effect—is to use the state's coercive power to aid religion." (italics added) 366 U. S. at 453.

Its latest statement in *Allen* is as follows:

> "Based on *Everson, Zorach, McGowan*, and other cases, *Abington School District v. Schempp*, 374 U. S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:
>
> > 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits, religion. Everson v. Board of Education.' 374 U. S. at 222." 392 U. S. at 243.

Paragraph 18 of the Complaint alleged that the Pennsylvania Nonpublic Elementary and Secondary Education Act, on its face and as applied, "(c) has as its purpose the advancement of religion and (d) has as its primary effect the advancement of religion."

More particularly, it was contended in briefs and at oral argument that the primary legislative purpose, as revealed by the official legislative history, was to alleviate an

alleged financial crisis of the Catholic parochial school system and thus to aid religion. This contention was, in form and in substance, made as an allegation of *fact* which appellants specifically offered to prove, after discovery, at trial. Appellants proffered the factual basis for the Complaint's contention that the legislative purpose was to aid religion by including in their brief verbatim excerpts from the hearings, committee reports, and debates on the floor of the House and Senate of Pennsylvania and proposed that the three-judge court take judicial notice of these official documents of the Legislature of Pennsylvania; or, in the alternative, offered to introduce them into evidence at trial. This material now comprises the Addendum to this brief.

As to the Act's primary *effect*, it was contended that the Act on its face advanced religion since the Act involved a statutory scheme under which it was obvious that there was no actual purchase of services and that the Commonwealth received nothing in return for its money; and, alternatively, it was contended that discovery and trial would prove the foregoing by placing the regulations and the form of applications for the state aid formally in evidence, prove that the recipient schools were rendering no additional services and, in addition, demonstrate the all-pervading religious character and purpose of the approximately 97% of the recipient schools which are church-affiliated.

The majority below concluded that the allegation that the primary purpose and primary effect of the Act was to aid religion was a conclusion of *law*, and as such, not admitted for the purpose of testing the sufficiency of the complaint. Having established that proposition, the court then said:

> "The question of law then presented is whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its ad-

ministration is to advance or inhibit religion." (App. A88)

This question was answered by the court entirely and solely by reference to the text of the Act itself. The majority determined the legislative purpose by accepting what the legislature itself, in the Act's preamble and findings, declared its purpose to be: "To promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; . . ." Other facts, declared to be facts by the legislation under attack, were accepted by the majority, e.g., the burden on the public treasury if private institutions were to cease to "bear their present educational burdens." The majority specifically declined to examine the legislative history because "the legislative findings of the state are not to be lightly set aside." (App. A92)

Having thus posed the problem, the majority proceeded to simply track, by quotation or in its own paraphrase, all of the declarations of policy, legislative findings, etc., with which the Pennsylvania Act was well fortified, and accepted the "purchase of services" concept as bona fide (appellants contended that discovery and evidence would demonstrate that it was a subterfuge if that was not obvious on its face).

The majority made frequent reference to *Board of Education v. Allen, supra.* The opinion quoted the observations in Mr. Justice White's opinion that religious schools perform secular functions. But, as the dissenting judge pointed out, no funds went to church institutions in that case and most all churches perform a variety of secular functions by way of care of the aged and infirm and wayward. Although not specifically citing these cases as a precedent, it *appears* that the lower court majority believed that *Everson*

v. Board of Education, supra, and *Allen* gave sanction to the Pennsylvania scheme. The obvious differences between supplying buses or books to children (or parents) and paying money into a church institution's treasury was ignored although both *Everson* and *Allen* were at pains to point out that no money went to the schools themselves.

Furthermore, the majority below did not come to grips with two more basic points of difference between the *Everson-Allen* situation and Act 109.

In those cases the benefit is conferred directly upon children and parents and only indirectly upon the institution, as is the case with police and fire protection and school crossing guards. Under Act 109 the subsidy is conferred directly upon the institution and only indirectly upon the children. The reason this difference is not merely one of form is that it is the direct financial relationship thus established, with the necessary attendant state supervision, that brings about a forbidden interdependence of state and church which cannot come into being by supplying children with a specific benefit like buses or books.[6]

A further difference, apparently not perceived by the lower court majority, is that the legislation under scrutiny in *Everson* and *Allen* conferred upon the children a specific benefit which they did not previously enjoy (that feature is absent here—there were no children without instruction in the specified subjects); here the legislation simply confers a benefit on church *institutions* which they previously did not enjoy.

Finally, the nature of bus transportation and bussing is finite in quantity; the nature of a cash subsidy, as Chief Judge Hastie said, is limited in amount only by the political power of religious groups.

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6. This difference is similar to Mr. Justice Brennan's analysis of the difference in result between *McCollum* and *Zorach*, as expounded in his concurring opinion in *Schempp*. See 374 U. S. at 262.

If the decision of the majority below were to prevail, it would, in one stroke, validate the efforts of the legislatures of the formerly *de jure* segregation states, to perpetuate school segregation via subsidies to "private" schools by binding the judiciary to those facts, policies and purposes which the legislature itself declared. The ingenuousness of the majority below has not been a characteristic of the Supreme Court in examining statutes under constitutional attack.

For particularly in First Amendment and equal protection areas, it is and historically has been the marked proclivity of legislatures bent upon accomplishing some political or social measure, where the object or the means appear to be of doubtful constitutionality, to camouflage their handiwork. Frequently this is done by setting forth in a preamble, or in declarations of legislative policy and legislative findings, constitutionally self-serving material.[7]

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7. In constitutional law, particularly in cases involving legislation which may invade First Amendment-protected areas, the courts have consistently looked through legislative window-dressing and have also been studious not to allow to be done by indirection that which could not be constitutionally done directly. Thus, licensing provisions which in any way inhibit free speech or assembly have regularly been stricken down, although clothed as merely regulatory measures within the police power. *Cantwell v. Connecticut,* 310 U. S. 296 (1940). Parade and picketing ordinances licensing ordinances for the use of parks and squares, sound-truck ordinances, loitering and disorderly conduct statutes are always put forth as having been passed under the guise of the regulation of traffic, public places, etc., which the courts have just as regularly seen through where their effect is even a tendency to stifle speech: *Thompson v. City of Louisville,* 362 U. S. 199 (1960); *Shuttlesworth v. Birmingham,* 382 U. S. 87 (1965); *Hague v. C. I. O.,* 307 U. S. 496 (1938); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. State,* 308 U. S. 147 (1939). In field after field the Court has pierced veils of legitimacy erected by legislatures bent upon evasion of constitutional prohibitions. In *Gomillion v. Lightfoot,* 364 U. S. 339 (1969), there was a geographic redistricting of Alabama state legislative districts. The Court looked past the form of the act:

> "While in form this is merely an act of redefining metes and bounds, if the allegations are established, the inescapable

If a legislature could insulate itself from a constitutional attack by making findings that its acts are constitutional, or other findings (no matter how contrary to the facts) which are to be deemed binding upon the courts, the whole power of judicial review would be stultified and the doctrine of the separation of powers handily subverted.

Actually, in the appellants' view, the majority of the lower court misapplied the *McGowan-Schempp-Allen* test altogether. In the first place, in the original formulation of the test, Chief Justice Warren in *McGowan* specifically calls for the purpose of the legislation "to be examined in conjunction with its legislative history."[8] 366 U. S. at 453. This makes it clear that the test in question is *not a mere rule of statutory construction but part of the substantive law of church-state cases.*

The court did not "search out the fact and truth . . . to determine if the Constitution has been violated," as required by *Evans v. Abney,* 396 U. S. 435 (1970).

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7 (cont'd)
human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."

This device did not prevail. The Court stated:

"A statute which is alleged to have worked unconstitutional deprivations of the petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries."

In *NAACP v. Button,* 371 U. S. 415 (1963), the Court looked through a plausible Virginia regulation which on its face appeared solely to be concerned with the suppression of barratry and champerty and case solicition to discern that its real purpose and effect was to inhibit the activities of the NAACP and the NAACP Legal Defense Fund in the institution of suits challenging racial discrimination.

8. A complete summary of the hearings before the Committee on Basic Education of the House of Representatives of the Commonwealth of Pennsylvania, held between April 3 and April 17, 1968, and excerpts from the debates on the floor of the House of Representatives and the Senate of the Commonwealth of Pennsylvania, are contained in an Addendum to this brief. The condensation is not selective. No material was found suggesting that there was *any* purpose of the legislation other than aiding the Catholic parochial schools and, in one or two instances, other parochial schools.

The legislative history as set forth in the Addendum is that the sole legislative problem of the alleged financial plight of the parochial school system and the sole legislative purpose was to in some way meet that problem.

What emerges from the legislative history (see Addendum) totally negates the defendants' posture, adopted by the majority below. Their position is, as it must be, that the state felt the need of obtaining teaching services in mathematics, modern foreign languages, physical sciences, and physical education and, to fulfill this need concluded that it should contract out these functions to private contractors, the merely consequential result of this being an indirect benefit to religious schools, constitutionally permissible since the primary purpose is secular. The legislative history is directly contracy. It makes it clear that far from the state having a *need* to purchase services, that purchase of services emerged from a dozen methods by which the financial *need* of religious schools might possibly be satisfied.

In *Grosjean v. American Press Co.*, 297 U. S. 233 (1935), at 250, the court had before it a tax upon advertising partially measured by the circulation of periodicals. The innocuous and legitimate facade was pierced in the following passage:

> "It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantee." [p. 250].

Where a properly pleaded issue under the establishment clause is raised in the context of some form of state aid to religious institutions, the substantive law of church-state relations requires a determination of the primary legislative purpose and, as a matter of substantive law, re-

quires the court, in determining that purpose to, *inter alia*, consider the legislative history of the questioned statute. It was error for the majority below to decline to take any notice of the proffered legislative history.

C. Purchase of Services?

The majority below adopted the contention of the defendants in their brief below that under Act 109 there was a "quid pro quo exchange, pursuant to contract. . . ." The majority accepted the facade of the face of the Act that what the statute authorized was for "the Superintendent of Public Instruction to enter into contracts." They speak of the payment made to the schools under Act 109 as being "in discharge of contractual obligations," which "may be made only after the service has been rendered." (App. A82) Chief Judge Hastie's dissenting opinion rejected this conclusion of fact and found that there was no "contract" in any proper sense of the word since the schools were not obligating themselves "to do anything for or in the interest of the state. The state buys no services and the school sells none. The artificial characterization of this procedure as 'contracting for secular educational services' does not help our constitutional problem." (App. A102).

What the dissenting judge rightly perceived from the face of the Act appellants offered to prove as a matter of fact, after discovery, i.e., that the Commonwealth of Pennsylvania, which paid the schools, commencing in September, 1969, for "educational services rendered in the preceding academic year", in fact received nothing. Appellants offered to prove that no children were being educated by the recipient schools that had not been previously educated by them prior to the subsidy; that indeed there was no change in the educational status quo whatsoever except for the transfer of a sum of money from the state to the nonpublic schools.

Neither the Attorney General nor counsel for any of the schools have ever been able to advise us how, or in what way, the payments to the nonpublic schools "advance the quality of the secular education," or just what it is the Commonwealth gets for its money.[9] The Act does no more than to confer (somewhat capriciously) varying amounts of public funds on private and religious institutions for doing what they were already doing for their own reasons and will continue to do as long as it is an imperative of their faith to do so. In short, the educational status quo has been left unchanged.

The majority below adopted the Attorney General's contention that the Act advances the quality of the secular education that each child of the Commonwealth will receive. The court, however, did not delineate how this was effectuated by Act 109. Clearly, as to the great majority of children who are in *public* schools the Act has no effect except that it may have reduced the amount of money available for their education.[10]

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9. It is noteworthy that the Attorney General does not advert to the *in terrorum* argument that was consistently advanced in the press and during the hearing and on the floor: that if the parochial schools did not get this assistance, they would be forced to close and the children would have to be educated in the public schools. Of course, this argument is not made because in the first place the defendants would have to prove this to be the case; but more importantly, it would not be a justification for an otherwise constitutional enactment—it never having been a principle of constitutional law that it is all right to do something unconstitutional if it would be inconvenient and more costly to do it constitutionally. Several states educate as high as 98.5% of their children in public schools.

10. Mr. Fox (Chairman of the Committee), L. J.—House, May 7, 1968, p. 501:

> "As every member of this House knows, we have passed a bill providing additional money for public schools. I am one of the members of the conference committee on that and we have been struggling so far rather vainly to find some additional money to finance that bill, to finance the program that we have already passed, and if we cannot find the money to finance that program, then most assuredly we cannot find an additional $26 or $27 mil-

As to all of the rest of the children, those in the non-public schools, we are likewise at a loss as to how the quality of their education has been improved. Perhaps discovery would disclose some improvements, but, if so, this will only lead to further constitutional difficulties. Either the school in question met the state's standards or it was not supposedly eligible to become a contractor. Subsidies to improve education on these subjects above and beyond the state's standards would manifestly be a discriminatory and unconstitutional use of tax funds to benefit private or parochial schools.

1. The Private Academies.

One way to ascertain whether the Act's purpose was, in fact, to improve the quality of the education of the children of the Commonwealth of Pennsylvania in the subjects of mathematics, modern foreign languages, the physical sciences and physical education, is to see whether the scheme adopted by the Legislature is entirely consistent with this alleged objective, or whether there is inherent in it significant elements which are inconsistent with the purpose now asserted.

In *Grosjean v. American Press Co.*, 297 U. S. 233, 250 (1935) the Court said:

> "The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing

10 (cont'd)
lion to replace what is being taken out by House bill No. 2170 [Act 109]. Consequently, it seems to me that it is incredible that we, when we do not have assurance of money in the general fund to finance a program that we have already passed, would endeavor now to pass a new program removing an additional $26 or $27 million from the general fund."

the publishers and curtailing the circulation of a selected group of newspapers."

One must likewise view with suspicion legislation which talks of educational needs and financial crises but results in the richest 3% of the schools getting one quarter of the available nonpublic school funds.[11] On the other hand, if there had once been injected into the Bill criteria based on *need*, it would be the *need* of the school, not the State or the pupils, and the elaborate window-dressing of purchase of services would collapse.

The Act, as passed, as we know, provides aid to all nonpublic schools, irrespective of their need. The question that presents itself is whether there was a rational legislative purpose for conferring aid on schools which obviously do not need aid, or whether this was done in order to either quiet political opposition or insulate against legal attack in order to further the main purpose of the Bill, which was to provide aid for Catholic parochial schools.[12]

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11. For example, the Penn Charter School, located in Philadelphia, has 726 pupils. It has a physical plant valued at over $4,000,000, a 10,000 volume library, 4 gymnasiums, 10 athletic fields, 8 tennis courts, 2 swimming pools, 2 indoor squash courts, and separate parking lots for faculty, seniors and juniors. Its endowment is $3,700,000. It will receive $57,000 this year, according to news reports. The Cardinal Dougherty High School has 5,800 pupils—almost 9 times as many—and it will receive $48,000. Discovery would put this situation of record for the State as a whole.

12. During the hearings and the debates, there was some restiveness with the prospect of conferring financial aid on wealthy private schools. Even William B. Ball, testifying as counsel for the Pennsylvania Catholic Conference, suggested that there should be some criteria relating to need (Page 65, Hearings, Committee on Basic Education). On April 3, 1968, Mr. Ball suggested: "I think there ought to be a limitation there. I fully see your point. The fancy academies don't need this, and their problem is not a public problem. Whether constitutionally you can separate is another question. I think you can."

Since the Legislature, rightly or wrongly, and the principal proponents of the Bill believed and agreed that aid to "fancy aca-

Appellants are prepared to prove that, the protestations of the private schools to the contrary, few, if any, of the traditional, high tuition, exclusive private academies are in any sense in need of state subsidy in order to continue teaching, and teaching very well, mathematics, foreign languages, physical sciences and physical education. The significance of this is not that it is unconstitutional for a state to confer its tax bounty upon those who do not need it, but rather that it pointedly illustrates the fact that "purchase of services" is a subterfuge.

When fundamental constitutional principles are at issue the courts have had no difficulty in piercing the facade of contrived legitimacies. As was said in *Lane v. Wilson*, 307 U. S. 268 (1938), with respect to the Fifteenth Amendment:

> "The Amendment nullifies sophisticated as well as simpleminded modes of discrimination."

Chief Judge Hastie saw through the purchase of services device by scrutiny of the face of the Act. Likewise he found that the "primary purpose and effect of the enactment is to help the non-public schools by supplying them with needed financial aids . . ." (App. A102), without referring to the material on legislative history in his opinion. Even on the present record of Complaint and the text of the statute it is suggested that this Court could do the same, with or without reliance upon the legislative history (of which judicial notice could be taken, the records being

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demies", to use Mr. Ball's phrase, was unnecessary, one wonders how, to the extent that they are included, the Bill serves any educational duty or purpose of the State. The children attending these schools were, of course, being well instructed at the time of the Bill's passage in these four subjects; it is not suggested that any additional children are now attending Mercersburg Academy, Episcopal Academy, or Penn Charter, or Shipley, or Baldwin, or Chestnut Hill Academy, or that they are receiving instruction in these four subjects out of the funds paid by the Commonwealth.

official, filed records of the Commonwealth and no suggestion having been made that the material set forth in the Addendum is inaccurate or selective).

D. The Act Prefers One Religion Over Another.

In the oft-referred to classic exposition of the religious clause of the First Amendment in the *Everson* case, one of the strictures, of long lineage; reaffirmed in that famous paragraph was:

> "Neither [the state or federal government] can pass laws which aid one religion, aid all religions or prefer one religion over another."

We have argued that the law aids "religions," but also plead and argued below the separate point that the law prefers one religion over another or, at most, two or three religions over all others.

Appellants set forth, in briefs filed below, considerable factual data which they offered to prove, if given the opportunity. This data, if properly put of record would prove that the effect of the legislation is to (a) aid and prefer the Catholic religion above all others, (b) to a lesser extent aid and prefer only those other four or five religions which maintain any parochial schools, and (c) discriminate against those religions who do not or cannot have church schools by reason of conviction, poverty or smallness of membership.

The court below totally ignored the point and the offer of proof. The contention of illegal preference and the offer to prove it as a fact was not alluded to in the majority opinion below.

Thus, as the record now stands, the lower court has ruled, *sub silentio*, that a complaint under which a plaintiff charges that state legislation, by purpose and effect, di-

rectly favors particular religions in a substantial degree does not state a cause of action under the religions clause of the First Amendment.

Nor was the factual proffer insubstantial or of dubious validity. It was drawn from government statistical sources.

Act 109 prefers the Catholic religion about all others. The Catholic religion is not only the principal, but almost the exclusive, beneficiary of the Act. Indeed, we have demonstrated in another portion of the brief, dealing with the legislative history of the Act, that aid to the Catholic church was the motivation and purpose of the legislation. The statistics confirm that this is the Act's effect.

Of the pupils in nonpublic schools in Pennsylvania, 96.6% attend church-affiliated schools.

In 1966, of the 1140 church-related elementary schools in Pennsylvania all but 56 were Roman Catholic. Of the 276 church-related secondary schools in Pennsylvania all but 27 were Roman Catholic.[13]

But beyond this, the Act prefers, to a much lesser extent, the very few sects which maintain any five-day, full-time schools at all.[14] One need hardly point out the vast number of churches, therefore, which do not maintain regular five-day schools and therefore have no way to participate in the benefits of the Act. There are any number of sects which are barred from any participation in the Act either (a) because they do not believe in parochial schools (e.g.,

13. Statistics of Non-Public Elementary and Secondary Schools, 1965-66, Office of Education, U. S. Dept. of Health, Education and Welfare, OE-20111, Tables 3a, 3b.

14. There are 15 elementary and 7 secondary schools maintained by the Friends. There are 14 elementary and 2 secondary schools maintained by the Lutherans. There are 27 elementary and 9 secondary schools maintained by the Seventh-Day Adventists, 8 elementary and 4 secondary schools maintained by the Jews, and there are 7 elementary and 3 secondary schools maintained by the Protestant Episcopalians. The Methodists and Baptists each maintain two schools, and no other sect maintains any accredited schools.

Jehovah's Witnesses, Unitarian Universalists, and a majority of Jews), (b) maintain parochial schools but believe aid violates separation of church and state (e.g., Seventh-Day Adventists,[15] some Quakers, Mennonites, Amish), or (c) are too poor to even conceive of maintaining a school system (e.g., Gospel Halls of the Plymouth Brethren, Negro Baptists, African Methodists, Churches of Good in Christ, Black Muslims, innumerable evangelical and fundamentalists sects, and the storefront evangelical sects), or (d) are small sects whose members are too few in numbers and too scattered to make it feasible, (e.g., Dutch Reformed, Moravian, Schwenkfelder, Swedenborgian, Wesleyan). Other relatively numerous sects such as Reformed Evangelical, United Churches of Christ, Congregationalist, Baptists and Methodists, Eastern Orthodox and Episcopal Reformed, do not in fact maintain a parochial school system, and will not benefit, but their reasons are not known. According to the Yearbook of American Churches, in 1961 there were 254 recognized religious bodies and sects in the United States. Under the provisions of Act 109, all of them are paying for the promulgation of religious tenets of others.

If the foregoing data is true, the Pennsylvania Nonpublic Elementary and Secondary Education Act violates both the establishment clause and the free exercise clause of the First Amendment.

Appellants need not, as the lower court seemed to require, plead what their own religious beliefs (or absence of them) are in order to be heard when they complain that they are being taxed to support the promulgation of the religious beliefs of others.

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15. Which sect nevertheless testified against the Bill on principle and has declined to apply for aid.

E. Under the Theory of the Lower Court, the State Is Using Religious Means to Serve Secular Ends.

Appellants have alleged that the primary purpose and the primary effect of Act 109 is to serve religious interests.

But if the theory of the appellees, and the majority below, is that the primary purpose and effect is secular, the Act runs into difficulty by reason of *McGowan* and *Torcaso, supra,* since at very least it employs "religious means to serve secular interests."

The Commonwealth's insistence that the Act does no more than employ, by contract, religious schools to teach secular subjects is not credible, but if accepted simply shifts the focus of constitutional infirmity from one point of vulnerability to another. In addition to the stricture against using religious institutions to carry out secular ends in *McGowan* and *Torcaso,* in *Schempp, supra,* Mr. Justice Brennan said:

> ". . . government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that non-religious means will not suffice." (p. 265)

There is nothing innovative about this doctrine. The Virginia Assessment Bill, it must be remembered, allowed, in its final version, the taxpayer not only to select the church of his choice, but to elect secular education as the recipient. Nevertheless, one of the principal grounds upon which Madison attacked the Bill was that it used "religion as an Engine of civil policy."

In short, even if the purpose of the Act herein were to accomplish secular educational ends and even if the primary effect were to serve a secular educational end, the scheme would nevertheless be unconstitutional because it uses religious means (i.e., institutions) to accomplish this end.

That the secular means are at hand in the form of a public school system which now educates the majority of the children of the Commonwealth need hardly be argued. Furthermore, North Carolina educates 98.5% and Utah 97.7% of their children in public schools, and in the process, Utah spends more per capita than Pennsylvania.[16]

The majority below took no notice of this ground of unconstitutionality.

F. Act 109 Creates an Interdependence Between Religious Institutions and the State.

The defenders of the Act maintain that the result of the Act is to create a cooperate working arrangement between the Commonwealth of Pennsylvania and the parochial school system under which the parochial school system takes on a portion of the duty mandated in the Pennsylvania Constitution to maintain a public school system and, in turn, the State, *pro tanto*, supports the parochial system.

But Justice Douglas, concurring in *Schempp*, said the Establishment Clause forbids "a working arrangement between the two bodies [church and state]."

The concept that interdependence offends the principles of separation likewise dates at least from the *Memorial and Remonstrance* and, as a concept, from Roger Williams and John Locke. As Mr. Justice Frankfurter commented in *McGowan v. Maryland, supra*, "What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion *in a manner which made the two in some degree interdependent, and thus threatened the freedom of each.*" (p. 465) (Italics added.)

It was the evils of interdependence which was at the core of Mr. Justice Rutledge's dissent in *Everson:*

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16. *Statistics, Nonpublic Elementary and Secondary Schools, 1965-66*, Office of Education, U. S. Department of Health, Education and Welfare, OE-20111, Table B.

"There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another."[17]

The perils of divisive religio-political struggles for greater shares of tax money, once the constitutional door is opened, was one of the prime grounds upon which Chief Judge Hastie dissented. Noting that there are other, even more secular activities of churches than education, such as care and shelter for the poor and aged, he said:

"If the Constitutional bar to state grants in all such cases should be removed, it is reasonable to anticipate continuing political controversy in every state and local community whether and to what extent public funds are to be granted to subsidize a large number and a broad range of activities of religious organizations. Leaders and devout members of various organized religious groups will see it as their duty to their church or sect

17. The strife which absolute separation seeks to avoid has apparently already been engendered by Act 109:

Rep. Bair, Legislative Journal—House, May 7, 1968, p. 507: "This question has caused much bickering, much hard feeling, and has torn apart both sides of the aisle. It has been constant trouble to the various members; it has torn communities apart.

* * *

"This bill that is before us today has caused more hard feelings and more unrest than anything else."

to seek such aid and to insist that state and local government contribute liberally to their sectarian enterprises. Legislators, government executives and candidates for elective office in whose judgment other claims upon the public purse merit higher priority can anticipate political opposition as enemies of the faith. In this way religion and politics will become *in pari materia*.

"So far we have escaped much of the divisiveness and antagonism of political differences and controversies about religious matters because public financing of activities of religious organizations has been understood to be prohibited by our Constitution." [App. A106]

The face of the Act, adopted by the majority below, asserts that the church schools are performing, in part, a public, secular function. But this Court, speaking through Mr. Chief Justice Burger, in *Walz v. Tax Commission of the City of New York*, No. 135, October Term, 1969 (May 4, 1970), 38 LW 4347, recognized that churches perform a variety of public functions and declined to sustain tax exemptions on that basis:

"We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social wel-

fare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimentions." 38 LW at 4350.

Here, according to the findings on the face of the Act and the theory of the Commonwealth, the state is in part dependent under Act 109 on the parochial school system for furnishing education.

"The hazards of churches supporting government are hardless less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation." *Walz v. Tax Commission of the City of New York, supra,* 38 LW at 4350.

The dependency of the church institution upon the state is equally offensive to the First Amendment, and those proponents of aid to their religious school systems are treading on dangerous ground, since traditionally in American politics control follows aid.[18]

One provision of Act 109 is potentially ominous from this standpoint. Section 5603(3) of the Act forbids "any subject matter expressing religious teaching, or the morals or forms of worship of any sect," to enter into the teaching of the named subjects.

Now, although the appellees ridicule the idea that any religious material could creep into the teaching of mathematics, physical sciences, modern foreign languages and

18. "It [the parochial school system] does not want to become a state operation. It wants some help . . ." William B. Ball, counsel for the Pennsylvania Catholic Conference, testifying before the Committee on Basic Education, April 16, 1968, p. 58.

physical education, and the majority below assumed the same, it is obvious that "modern foreign languages," since that perforce could embrace the whole literature of a nation, could be a vehicle for unlimited religious indoctrination. What is perhaps less obvious, but which would be demonstrated by discovery, is that many areas of knowledge and teaching within the designation "physical sciences" not only *can,* but, to be true to several particular faiths, *must* be taught with a religious hue; must, at very least, be God-oriented. Appellants offer to prove, if given the opportunity, that a Catholic cleric teaching in a parochial school who teaches astronomy for instance, without any reference to God violated his religious training.

More specifically, appellants offer to prove, for example, that one of the defendant schools, the Montgomery Christian Academy, in a physical science course, teaches the Biblical account of the creation and merely "exposes" the students to the theory of evolution, as a hypothesis which it advises its students is not believed by the school authorities.

Now, appellants do not object to any of this being done because of a belief that it is wrong. They object, on the contrary to the state placing itself in a position of requiring the Superintendent of Public Instruction to stop it. That is what Section 5603(3) requires.

Since the proceedings below were cut off at the threshold no one knows how the state proposes to police the classrooms. Interrogatories already filed would, if allowed to be answered, shed some light. Will the Superintendent of Public Instruction make announced visits? or surprise visits? Given the understandable proclivity for a teaching nun to select readings in French which "reflect the morals . . . of any sect" [§ 5603(3)], perhaps undercover student agents would be necessary to insure that the French class stays secular.

To those of deep and permeating faith there is no such thing as a "secular subject."

Indeed, it is this proposition to which, to its credit, the Catholic church has steadfastly adhered and is the reason it maintains a parochial school system.

As Mr. Justice Brennan said in *Schempp:*

> "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." [At 259.]

Again and again scholars of the concept of separation have reverted to this question of the evils of interdependence which inevitably occur when secular and religious operations are blended, with the state as a party. The concern is no less the protection of religious bodies from state interference as it is the converse. For as Madison observed, what the state can foster and aid it can likewise deter and control.

Schempp quoted with approval one of Pennsylvania's most distinguished Chief Justices, Jeremiah S. Black, as follows:

> "The manifest object of the men who framed the institutions of this country, was to have a *state without religion* and a *church without politics*—that is to say, they meant that *one should never be used as an engine for any purpose of the other . . .*" Essay on Religious Liberty, Jeremiah S. Black, 1886, p. 53.

The various aspects of the establishment clause tend to interlock and support each other; they form a continuous web of separation. Thus the forbidden concept of interdependency discussed in this section has aspects of the con-

cept of "neutrality" so basic in the First Amendment concept of a proper relationship between government and religion. The majority put this well in the *Schempp* opinion:

> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about *a fusion of governmental and religious functions or a concert or dependency of one upon the other* to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits." (Italics added.) (p. 222)

Act 109 does in fact fuse governmental and religious functions and the appellees, particularly the Commonwealth, are the first to say so. It also brings about "a concert or dependency of one upon the other." Indeed, again so clearly is this a characteristic of the Act that it is put forward by the defense as one of its virtues.

The court below declined to allow the inquiry to be made with respect to Act 109 suggested by Mr. Justice Brennan, concurring in the *Schempp* case:

> "A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." 374 U. S. at 236.

The contention that a forbidden interdependence is created by the Pennsylvania Nonpublic Elementary and Secondary Education Act is one of the prime issues in need of the full resources of federal discovery and evidentiary procedures in order to be presented for judicial decision with that completeness of record to which the Court is entitled.

PART II.
ACT 109 VIOLATES THE FOURTEENTH AMENDMENT.

A. The Allegations of the Complaint.

Act 109 on its face and as applied violates the Fourteenth Amendment in that it constitutes a denial of the equal protection clause.

The Complaint in paragraphs 14 and 15 alleges that the Act authorizes payments of tax funds to educational institutions whose policies and practices, by purpose or effect, exclude from admission, or otherwise discriminate against persons by reason of race or religion. It also alleges that tax funds will be disbursed to private educational institutions which by purpose or effect discriminate by reason of race in the employment of teachers and other persons to administer the educational services specified in the Act. The complaint charges three things under the Equal Protection Clause of the Fourteenth Amendment:

(1) Racial discrimination as to students admitted to the institutions;

(2) Religious discrimination as to students admitted to the institutions;

(3) Racial discrimination in employment;[19] and

(4) Religious discrimination in the de facto exclusion of all but chosen sects as to the benefits of the Act.

Appellants contend that the payment of substantial amounts of tax funds for the support and maintenance of

19. Paragraph 15 of the Complaint charges with respect to discrimination in employment, discrimination by reason of both race and religion. Plaintiffs press only racial employment discrimination.

these private institutions as they now exist constitutes state action which is reached by the equal protection clause of the Fourteenth Amendment.

B. Standing.

The lower court adopted a very narrow view of *Flast v. Cohen*, 392 U. S. 83 (1968), in holding that even the one taxpayer who had paid the precise tax from which the funds for the subsidy were derived, although a Negro with children in the public schools, could not raise the equal protection issues which alleged harm to the public schools unless it were alleged that his particular children were refused admittance to a school receiving aid. Appellants contend that the nexus between the putative party's taxpayer status and the particular grounds for his attack upon legislation as delineated in *Flast* was intended to be a generic test and that that nexus exists with respect at least to the Negro appellant Alton Lemon.

Furthermore, standing under *Flast v. Cohen* being a matter of judicial judgment, the evidentiary material as to the extent and impact of discrimination in nonpublic schools may affect the standing question. If it can be demonstrated that, even though Alton Lemon's children have not applied for admission to a nonpublic school, the effect of Act 109 in perpetuating, and perhaps increasing, segregation is such as to have an adverse effect upon Negro children in the public schools, Lemon's standing may be enhanced.[20]

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20. In *Coffee, et al. v. State Education Finance Commission*, 296 F. Supp. 1389 (1969), challenging a Mississippi tuition grant statute, to private school pupils, the three-judge court did not find a standing problem where the complaint alleged (Complaint, Para. 3) that the plaintiffs were Negro students and parents of Negro students in the *public* schools. There was no allegation that any had sought entrance to the white private schools. This case was not appealed.

C. Dismissal of Complaint on Motion.

The principles governing the circumstances under which a motion to dismiss may be granted, discussed at the beginning of the brief, are particularly apposite in the case of the Third Count of the Complaint because of the necessity for discovery on the point. The applicable law will be discussed below but it will be readily seen that in this situation the Court will have to decide whether, in the light of the degree and pervasiveness of the discrimination, the involvement of the state is of a sufficient degree to constitute "state action". A court cannot "sift facts" or "weigh circumstances" on a motion to dismiss. Therefore, the doctrine that a complaint may not be dismissed for failure to state a cause of action unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which can be proved in support of the claim should have been strictly adhered to.

D. The Known Facts With Respect to Racial Discrimination.

Discovery is required to develop the statistics of discrimination; but some facts are known.

The nonpublic school system in Pennsylvania is a white school system.

The private non-church-related schools are white schools, some of which in recent years have accepted a few token (middle-class) black students.

The non-Catholic church-related schools are virtually 100% white.

The Catholic parochial school system has a larger percentage of black pupils, but it is segregated. The only figure that is known at this time is the percentage applicable to Catholic schools inside the City of Philadelphia, which is understood to be 6%. This must be measured against a Negro enrollment of 59% in the Philadelphia

public schools.[21] The Philadelphia Archdiocesan schools have more white students than the public schools. However, if the figures are taken for the greater Philadelphia area which comprises the Archdiocesan School System (Philadelphia, Delaware, Montgomery, Bucks and Chester Counties) this percentage would drop precipitously, since for all practical purposes, Catholic schools in these counties have no Negro enrollment. Furthermore, the 6% figure for the schools inside the City of Philadelphia is deceptive. Over half the schools have no Negro pupils at all. Half of the remaining have an average of 7% Negro. Data from the Human Resources Center of the University of Pennsylvania derived from the Office of the Superintendent of Philadelphia Archdiocesan Schools shows that over half of the Negro enrollment is in fifteen all-black schools. These schools are mission schools. To its great credit the Philadelphia Archdiocese supports and maintains fifteen black ghetto schools for black children . . . but this is not integration.

In addition to the fifteen schools that are 100% black, a substantial number of the rest of the black students in the parochial school system in Philadelphia are in three schools where the percentage of black students is above 85%. By contrast, there are eight smaller schools where the mixture between black and white is between 40 and 60%. But the total number of students in these schools as of June 1966 was only 2,920 as contrasted with 6,366 in the all-black schools. The remainder, and vast proportion of the system even in the City of Philadelphia, is white. Over 26,000 parochial school students attend school with a black enrollment of between 5 and 9%. Over 71,000 pupils attend schools with no black students at all.

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21. Board of Education statistics do not include Puerto Ricans as non-white. They comprise an additional 2½%. It is not known how the Archdiocese counts Puerto Ricans.

The above figures are only those for the City of Philadelphia. In the four surrounding counties discovery would show that the black enrollment is but a fraction of 1%.

It is, one hopes, scarcely necessary to say that appellants make no charge here that the Catholic church intentionally promotes or seeks to perpetuate racial discrimination and one recognizes that racial imbalance is inherent in a school system which exists for the purpose of teaching Catholic children in a society where almost no Negroes are Catholics.

Also, lest it be misunderstood, this brief, written without benefit of discovery, focuses in this section on the situation in the Philadelphia Catholic schools because of an absence of precise data with respect to non-Catholic church-related schools and private non-church-related schools. If this data is provided it will undoubtedly reveal a pattern of greater segregation and discrimination, probably less justified, than the above.

With respect to discrimination in employment of teachers and administrative personnel, it is, in all of the non-public schools, virtually total and complete. As discovery would reveal, a black teacher or administrator (and even clerical personnel) will be found to be a rarity in the recipient schools.

The defendant schools taken strong exception to the allegations of the Complaint contained in Paragraph 5, which alleges that the future consequences of the Pennsylvania plain will be the establishment of two school systems: "A public school system predominantly black, poor and inferior, and a nonpublic schools system predominantly white, affluent and superior." [App. A10]. Of course, there is nothing objectionable about them from the standpoint of federal pleading and allegations of this same general tenor generalizing about the effects of racial discrimina-

tion in the schools can be found in the original complaint in *Brown v. Board of Education,* 347 U. S. 483 (1954). Allegations predicting future events which will come about as a result of certain unconstitutional state action are present in the complaint of *Dombrowski v. Pfister,* 380 U. S. 479 (1965).

The defendant schools take particular exception to the statement in Paragraph 5 that one of the effects of Act 109 will be to enable parents seeking to escape association of their children with fellow Negro students to more easily do so. They characterize this allegation as scandalous. The charge is not scandalous; the fact is. But actually, it comports with the report of President Nixon's Task Force on Education as reported in the Congressional Record, March 12, 1969, page H1660:

> "Lastly, we must call attention to the close relationship between one aspect of the Church-State issue and the enforcement of Civil Rights legislation. The more it becomes public policy to try to circumvent the First Amendment by aiding private schools indirectly through aid to the individual student under the 'pupil benefit theory,' the greater the danger of undermining integration efforts in those states where substantial numbers of parents have sought to avoid the consequences of integration by sending their children to private schools. . . ."

The allegations of Paragraph 5 are of major import in this litigation for there are two issues at stakes in this case: One is whether the traditional separation of church and state is to be maintained or whether the state and the church (or at least some of the churches) are to become engaged in a joint undertaking, and hence to become intertwined and interdependent. The other is whether the United States is to have, like Northern Ireland and the

Netherlands,[22] a dual school system, both publicly supported, one secular and one religious.

One of the "predictions" of Paragraph 5 of the Complaint is that one effect of the plan of aid (which will inevitably increase) embodied in Act 109 is that less money will be available for the public school system, thus accelerating the flight of middle-class whites from the public schools. This fact was recognized by many members of the legislature. It is obvious that the initial $5 million to be paid out in the school year 1969-70 will be only the beginning if this Act is upheld. In 1969 the Pennsylvania House of Representatives had under consideration a bill providing $23 million in state aid to nonpublic schools.

That there is in fact "discrimination", as well as racial imbalance, would appear to be clear from the fact that an opinion of the Attorney General (in the form of a supplemental memorandum of law filed at the request of the lower court after oral argument), ruled that Article VII of the Governor's Code of Fair Practices entitled, "Public Contracts", which reads as follows:

> "Every state contract for public works or goods or services shall contain a provision barring discrimination on account of race, color, religious creed, ancestry, age, national origin or sex, and such contractual provisions shall be fully and effectively enforced." [App. A72]

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22. A memorandum prepared by the Chief Counsel of the Committee on Basic Education of the House, part of the public record in Harrisburg, records the following:

> "It would encourage a proliferation of school systems, or at least a dual school system. The danger to the public school system is illustrated by the experience in Holland where some 80% of the students attended public schools. The Constitution was amended permitting aid to nonpublic schools and today only 20% of the students go to public schools. It has also brought about profound changes in the social, economic and political structure of the country."

is, in effect, suspended with respect to religious discrimination as to contracts under the Pennsylvania Nonpublic Elementary and Secondary Education Act.[23]

E. The Court Below Should Have Permitted Appellants to Develop Material on the Alleged Equal Protection Violation.

There are two elements of discrimination in Act 109 on which the appellants have no cases directly in point under the equal protection clause. The first is the discrimination, on religious grounds, in the selection of pupils and employees, as a violation *of that clause*. But it is contended that all of the material developed in the previous portion of the brief with respect to the preference of one sect over others establishes that the state cannot so discriminate under the First Amendment, and that therefore the question will turn on whether or not Act 109 constitutes sufficient involvement of the state in aiding *de facto* racially segregated institutions as to also constitute "state action" violative of the Fourteenth Amendment.

Nor do appellants have a case directly in point on state subsidy to a segregated private school system where the

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23. This situation came about by reason of the fact that, by agreement of counsel prior to hearing on the motion to dismiss the Complaint, appellants took the deposition of Vincent J. McCoola, Coordinator of the Act, who testified that the Department of Education was not including in the contracts with the nonpublic schools the above quoted nondiscrimination clause required to be in all state contracts. The question was raised at oral argument and the apparently insoluble dilemma was resolved by the Attorney General's ruling.

Subsequently, with respect to a companion Pennsylvania statute, Chief Judge Hastie, in his dissenting opinion, said:

> "It is difficult to see how the provision of the Pennsylvania Fair Educational Opportunities Act that sanctions religious discrimination in admission policies and practices of sectarian schools could validly be applied to sectarian schools that receive public financing under Act No. 109. 24 P. S. § 5004(c)." [App. A106]

segregation is primarily *de facto* and where the primary purpose of the legislation was not the perpetuation of formerly *de jure* segregation. Nevertheless, cases do exist upon which such a ruling could be founded, particularly if appellants are permitted to develop the extent of the state action by discovery and evidence.

As Judge Wisdom said in *Poindexter v. Louisiana Finance Assistance Commission*, 275 F. Supp. 833 (1967); aff'd *per curiam*, 389 U. S. 571 (1968). "There is no such thing as the State's legitimately being just a little bit discriminatory."

That case was a class action brought by Louisiana public school children and their parents attacking the constitutionality of an act authorizing tuition grants to pupils attending private schools in Louisiana. The three-judge court consisted of Wisdom, Circuit Judge, and Christianberry and Ainsworth, District Judges. The Court decided that the purpose and effect of the act was to continue segregated education in Louisiana by providing state funds by way of tuition grants. The amounts involved were relatively small —in the neighborhood of $2 to $3 million.

> "The payment of public funds in any amount through a state commission under authority of a state law is undeniably state action. The question is whether such action in aid of private discrimination violates the equal protection clause.
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> * * *
>
> "But decisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 percent or adds up only to 49 percent of the support of the segregated institution. The criterion is whether the state is so *significantly* involved in the private discrimination as to render the

> state action and the private action violative of the equal protection clause. (Here the plaintiffs ask only that the state be enjoined from paying the tuition grants; not that the schools be desegregated.)" p. 854.

Judge Wisdom said that the Supreme Court had never attempted to formulate an infallible test for determining whether the State had become significantly involved in private discriminations, and went on to state, "The facts must be sifted and weighed on a case-to-case basis." At 856. This points out again the need for discovery as to the Third Count. Judge Wisdom's conclusion, upon review of the cases, was this:

> "The cases in this area of law teach, however, that there is no constitutional basis for courts to adopt as a test the predominance of state financial support." [p. 856]

As noted above, this case was affirmed, *per curiam*, by the Supreme Court.

Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961), indicates that the involvement of the state may be slight and indirect. There the Supreme Court said:

> "Only by sifting and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." [p. 722]

In *Griffin v. County Board of Education of Prince Edward County*, 377 U. S. 218 (1964), however, the Court seemed to require that the state support of a segregated school be "preponderant" for there to be a finding that there was "state action." As will be seen, the concept of what constitutes "state action" has been broadened since 1965.

The case of *Reitman v. Mulkey*, 387 U. S. 369 (1966) can only be read as substituting a new test for either "the

determinative" or "the preponderant" test of *Griffin*. The test of "state action" in *Reitman* was "significant involvement."

But there is more than that in the *Reitman* decision which is highly pertinent to the instant case. First of all, the Court clearly backed away from the rigidity of *Griffin* and invited ad hoc determination (as Judge Wisdom likewise perceived in *Poindexter*) by saying that the "court has never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become significantly involved in private discriminations."

The Court in *Reitman* spoke of "the necessity for a court to assess the potential impact of official action in determining whether the state has significantly involved itself with invidious discrimination." Its "potential impact," in addition to present discrimination, is what is plead in Paragraph 5 of appellants' Complaint.

There cannot be the "sifting and weighing" required by *Burton v. Wilmington Parking Authority, supra,* nor an assessment of "the potential impact of official action" required by *Reitman* without the opportunity to present evidence.

CONCLUSION.

With respect to the First Amendment:

This Court can, at this stage, recognize that Act 109 is unconstitutional on its face and now so rule with the thought that evidence cannot save a facially unconstitutional enactment.

Alternatively, the controversy can be ended at this stage by adding to the Complaint and the text of the Act, both of record, the legislative history by taking judicial notice of official legislative records of the Commonwealth

of Pennsylvania,[24] finding that they establish a primary legislative purpose to aid religion and declaring Act 109 unconstitutional.

On the other hand, there is not sufficient record before the Court to declare the Act constitutional because several of the appellants' constitutional contentions, all supported by Supreme Court cases, require evidence to establish the factual record upon which they are founded. An example is the contention that the Act prefers one religion over all others (with minor preference to two or three others), for this contention is based upon certain facts which, although they are drawn from official governmental documents, are not technically of record, e.g., that 97% of the schools receiving are subsidy are Roman Catholic. Likewise, the contention that the purchase of services device is a scheme to make it appear that the state is receiving a *quid pro quo* for its tax money, (although discerned by the dissenting judge from the fact of the Act itself) would be buttressed (a) by proof from the appellants as to the way in which the Superintendent of Public Instruction is administering the Act and making payments; (b) the fact that no new or different or additional children are being educated in the named courses; and (c) that the cost-reimbursement formula capriciously favors the richest and highest-cost schools.

The relief sought, therefore, of the Supreme Court is either a declaration of unconstitutionality or reversal and remand with guidelines for the three-judge court to proceed with the usual course of litigation at the District Court level.

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24. The Addendum contains extensive extracts. The physical records, in the form of copies of typed transcripts certified by the court stenographer and photostatic copies of the printed Journal of the House and Senate are all in counsel's possession and could be physically filed with the Clerk of the Supreme Court, if so ordered.

With respect to the Fourteenth Amendment:

The Court should either (a) rule on the standing issue, particularly with respect to Alton Lemon, or (b) accord Alton Lemon standing *pro tem* for discovery and trial on the theory that this is needed to properly resolve the standing issue. This would leave the question of whether the Complaint states a cause of action under the equal protection clause of the Fourteenth Amendment undetermined. Since the appellees would then be in a posture of having a Motion to Dismiss Count III, For Failure to State a Cause of Action, of record and not ruled upon, this Court might see fit to determine that question.

Respectfully submitted,

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June, 1970.

ADDENDUM TO BRIEF.

Legislative History of Act 109.

Any reasonably informed reader of the public press in Pennsylvania in 1967 and 1968 could have little doubt as to what the problem was that led to Act 109. Catholic churchmen and educators from one end of the Commonwealth to the other proclaimed the need of the parochial school system for State funds. A dozen different schemes were proposed by various legislators, some of which seemed unable of passage, some of which were threatened with veto by the governor, and one of which finally passed. All of this was carried on with considerable publicity, and dozens of committees, groups and institutions were arrayed for and against such aid. Letter-writing campaigns were organized. Delegations called upon legislators. But we recognize that although this matter is almost one of which the Court could take judicial notice,[1] we must turn to the official record to definitively prove the legislative purpose, since Pennsylvania, unlike many states, com-

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1. "The defendants argue that we should not probe for the purpose of this legislation, that we should ignore the events which led up to and accompanied its passage, and determine its validity based on its language. But '. . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.'" 197 F. Supp. 649 (1961) at 652; (citing Mr. Justice Field, sitting as Circuit Judge in *Ho Ah Kow v. Nunan*, Fed. Cas. No. 6, 546, 5 Swy. 552, 560). *Hall v. St. Helena Parish School Board*, aff'd per curiam 368 U. S. 515 (1961).

mittee proceedings are transcribed and debates are printed in a Journal.[2]

The hearings on the bill which actually passed and became Act 109 (House Bill No. 2170) and on other alternative methods of aiding Catholic schools (such as House Bill No. 2085 which provided tax credits to parents with children in parochial schools) opened on April 3, 1968 before the Committee on Basic Education. That opening hearing was devoted to and is entitled, "Aid to Non-Public Schools, Method—Vehicle." The Chairman of the Committee, Representative Donald W. Fox, stated the problem before the Committee as follows:

> "Very briefly, before we begin I want to make this general statement. The previous hearings of this Committee brought out the fact that some twenty percent of the school children in Pennsylvania are being educated in nonpublic schools and that many of these school systems are in serious financial difficulty. The Committee now has been asked to try to find out if state funds can be used for aid to nonpublic schools. These hearings are to explore in depth and in as scholarly and objective way as possible the mechanics, costs, controls and constitutionality of public support of private schools."

After the introduction by the Chairman, Mr. Edward Hussie, a member of the Committee staff, made a presentation, at length, on "methods used to aid nonpublic schools."

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2. Judges Wisdom, Christenberry and Wright, in the *Hall* case (cited in the preceding footnote), having no such official legislative record available in Louisiana, said: "In Louisiana, as in most states, the legislative debates, committee proceedings, and committee reports are not recorded officially. Going to the next best records, newspapers, . . ." and concluded that, "The sponsors of this legislation, in their public statements, if not in the Act itself, have spelled out its real purpose." Fn. 8 at 649 of 197 F. Supp.

He did not testify on methods of improving education or methods of aiding the teaching of mathematics, modern foreign languages, physical sciences and physical education. Mr. Hussie reviewed all of the different means by which money could be gotten to religious schools: "Most notably," as he said, "those that pertain to the health and safety of the child." All of these methods, including textbooks, textbook aids, devices of various types, released and shared time, etc., were reviewed as they exist in the various states of the country. (Mr. Hussie did not suggest that there was any plan anywhere like that in Act 109.) [Hearings, April 3, 1968, Tr. 6, et seq.]

There then appeared as a witness Dr. B. Anton Hess, Commissioner of Basic Education, Department of Public Instruction [Hearings, April 3, 1968, Tr. 12, et seq.], and if anyone might have enlightened us as to purely educational and pedagogical, i.e., secular, problems and proposed solutions it surely would have been Dr. Hess. But Dr. Hess did not suggest that there was any lack of teaching these subjects in the public schools or that there were any children not being educated in these subjects. Dr. Hess addressed himself only to enumerating the existing child benefits and auxilliary programs which in some way aided parochial school children.

In fact, under questioning by Committee counsel, Dr. Hess said that with some lead time notice to make preparation, it would be possible "for all of the students in the catholic schools in Philadelphia to be taught math, sciences and languages next September by the public schools" and that the Philadelphia school system then "would have included in their subsidy from the State credits proportionately for those students." [p. 18].

After the staff report and that of the Superintendent of Public Instruction, the lead witness was William B. Ball, Esq., counsel for the Pennsylvania Catholic Conference.

[Hearings, April 3, 1968, Tr. 20, et seq.] Mr. Ball commenced by adverting to the fact that "for the past fourteen months such spokesmen [for Catholic and Hebrew schools[3]] and representatives have been trying at any rate to state their case to the General Assembly in considerable detail." He agreed with the opening statement of Chairman Fox as to what the problem was and then commented on the various programs designed to benefit all children including parochial school children, and went on to state that shared time programs simply were not sufficient to solve the problem, i.e., provide sufficient financial relief [pp. 20-23].

Mr. Ball testified that it was the view of the Pennsylvania Catholic Conference, "That the solution of Pennsylvania's educational crisis is to afford nonpublic education a measure of support, within strict constitutional limitations, sufficient to enable it to continue to render its public service." [p. 26] Mr. Ball reviewed the various aid proposals at length and finally, at p. 37, recommended the method of purchase of secular educational services as reflected in House Bill No. 2170.

Representative Charles H. Dager, Legislative District No. 151, Montgomery County, testified [Hearings, April 3, 1968, Tr. 68] that, "The advocates for aid state that their schools are in a financial crises and if aid is not forthcoming from government, they will be forced to close their schools and send the children to the public school system." He opposed financial grants, however, on the grounds that they "can only grow and result in the state ultimately financing two or more separate school systems." [Tr. 70] He therefore advocated a tax credit approach by referendum by a majority of voters of a specific school district.

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3. In fact the record reveals that only one Jewish spokesman, Dr. Cohen of Beth Jacobs Academy, testified in favor of the Bill. The Rabinnical Assembly and United Synagogue, the American Jewish Congress, the Jewish Community Relations Council of Philadelphia and Pennsylvania, testified against the Bill.

David A. Horowitz, Deputy Superintendent of Instruction of the School District of Philadelphia, testified as to the various programs in the City of Philadelphia in which there were joint educational ventures with the schools of the Philadelphia Archdiocese, particularly those federally funded projects under the Elementary and Secondary Education Act of 1965, providing for educational services to poverty area children. Those receiving services under Title I of that Act included 30,000 parochial school pupils in programs ranging from speech therapy, remedial reading and audio-visual aids at instructional materials centers set up by the School District of Philadelphia. He also discussed a shared time program and new facilities which would permit more extensive shared time programs. Dr. Horowitz testified further that the cooperation of the public school district with the Archdiocese was motivated by the requirement of administration of federal educational funds through public channels, the practical necessity being in planning on such matters as the location of schools and because it helps to effect educational integration since "the parochial school system having (sic) more white pupils and enrollment than we have in our system, despite the fact that our total enrollment is 280,000 and theirs is 160,000." (Hearings, April 3, 1968, TR 123)

Louis Canosa, Education Superintendent, Pennsylvania Conference of Seventh Day Adventists, testified (Hearings, April 8, 1968, TR 78) that the Seventh Day Adventists operate the second largest parochial school system in the world and have the highest proportion of their children in their parochial schools of any American denomination (six out of ten) and that they do this because "for many years churches have known that the parochial school is the strongest machine the church can operate for maintaining and increasing its membership and its strength."

Mr. Canosa testified against state subsidy and indicated that in any event the Seventh Day Adventists would continue to support their own school system.

Monsignor Edward S. Hughes, Superintendent of Education, Archdiocese of Philadelphia, testified [Hearings, April 8, 1968, Tr. 31] at length about financial need and the inadequacies of shared time.

James F. McGrath, President of the Association of Catholic Teachers, AFL-CIO, testified as to the future projected costs of the Archdiocesan Secondary School System.

And so it went throughout the hearing. The proponents uniformly testified not about an existing educational or pedagogical problem but about a financial problem.

It would serve no purpose to quote any more material from the hearings. They comprise five volumes and if the purpose of a bill is to be measured by looking at the problem that it was devised to cure, the sole and solitary purpose of financial aid to parochial schools is found.

The staff studies reveal the same concern. The Chairman of the Committee filed an extensive report based upon Mr. Hussie's staff study [Committee of Basic Education, House, Tr. 5, April 16, 1968] This study does not pose any general educational or pedagogical problem. It assumes that its task is to explore all the methods that have ever been suggested in the United States for financial assistance to the Catholic parochial school system. The Chairman's Report to the House membership is comprised of four sections: "Vehicles," "Methods Used to Aid Non-Public Schools," "Standards and Controls," and "Standards and Controls—What Other States Are Doing." In this extensive Committee study there is not the slightest suggestion that there is any purpose under consideration other than finding a way to channel funds to the Catholic parochial school system. The study's reference to the testimony of personnel of the Department of Public Instruction

does not advert to any secular purpose or pedagogical need. The study notes that the Department declares itself ready, with reasonable notice, to cope with additional students.

The Bill as presented to the House (House Bill No. 2170) provided for an authority which was to enter into contracts with nonpublic schools. It came before the House on second consideration on May 7, 1968. Representative Fox, as Chairman of the Committee, immediately presented amendments which eliminated the authority and vested the administration of the Act in the Department of Public Instruction,[4] it having been Mr. Ball's opinion, in his second appearance on April 17, 1968, that the authority device "does nothing to insulate the program constitutionally." [Hearings, April 17, 1968, Tr. 50] The amendments were supported by the principal sponsors and Rep. Mullen said he was in favor of the amendment because the authority might raise additional constitutional problems and, as he said,

> "We know we have problems, but we do not want to make them any more complicated than what we have."[5]

Rep. Fox offered an amendment confining the source of the funds to flat racing only and moving the effective date of the Act from July of 1968 to July, 1969, giving as his reasons that there was not enough money available to the State to finance the recently passed bill providing additional money for public schools. Rep. Coppolino opposed the amendment, saying,

> "The need for aid to nonpublic schools is immediate. The nonpublic schools cannot be aided immediately by the proposals made in this amendment."

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4. Id., at 501.
5. Id., at 500.

Rep. Mullen also opposed the amendment on the same grounds, saying,

> "We need the money now; we need the money next February when the services to be rendered under the terms of the bill, the first half of the services, would be completed."[6]

Debate then commenced (Legislative Journal—House, p. 503, et seq.) on the consitutionality of the Bill. Rep. Mullen stated,

> "We certainy do have in mind a legitimate secular legislative purpose, and that purpose is simply to educate boys and girls who are attending nonpublic schools."[7]

A vote was taken on a point of order that the bill was unconstitutional; it was defeated 113 to 70.

Rep. Nicholson offered an amendment authorizing each school district to supply school teachers to nonpublic schools within the district for the purpose of teaching the same four courses, the school district to be proportionately reimbursed. Rep. Nicholson contended that this would be the simplest and least expensive way to accomplish Rep. Mullen's secular objective of educating boys and girls in these subjects who were attending nonpublic schools. That amendment was opposed by the proponents and defeated 109 to 76.

Rep. Dager offered a complex amendment providing for a referendum in each school district on the question of granting a tax credit against any taxes for school districts of any payments made by the same taxpayer. In arguing for his amendment Rep. Dager spoke of the

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6. Id., at 502.
7. Id., at 504.

". . . decision of this legislature that the aid to nonpublic schools should be given . . ." *Id.*, 509

House Bill No. 2170 came on for third consideration the following day, May 8, 1968, and is reported commencing at p. 531 of the Legislative Journal—House. Lengthy remarks on constitutionality of the Bill are spread upon the record, Legislative Journal—House, pp. 532-545. A number of members of the House (Messrs. Ryan, Gelfand, Kester, Donaldson) urged that the matter of constitutionality could only be settled by the courts. Indeed, Rep. Gelfand said that although it was his "firm conviction" that the measure was unconstitutional, he was going to vote for it so that this issue could be decided "ultimately in the United States Supreme Court, and not by this body, which is subject to many pressures other than that issue at hand." [p. 543.] Some speakers talked in terms of shortage of money for the public schools, e.g.,

> "This House passed and sent to the Senate a [public] Teachers' Salary Bill that is $19 million in excess of what the administration and, apparently, what the Senate majority believes was available." [p. 544 (House)]

The two principal sponsors, Rep. Mullen and Rep. Coppolini, repeated their arguments for a "fair share" of tax money, and the debate closed with Rep. Fox, Chairman of the Committee, acknowledging problems of financing public education.

> "Our nonpublic schools are in a desperate financial situation, especially the Catholic parochial schools which represent about 90 percent of the nonpublic school system." [p. 545 (House)]

The Bill whereupon went to vote and passed 105 to 80.

The Bill reached the Senate on second consideration on June 11, 1968 and on third consideration the following day. Debate on the constitutionality of the Bill ensued. On the merits only Sen. Oesterling and Sen. Lamb spoke in favor. Both made only one point as to the legislative purpose of the Bill. Sen. Oesterling said:

> "Today, however, they [nonpublic schools] find themselves in a situation—and not an uncommon situation—where they need financial aid. They have now looked to the Commonwealth for assistance, and neither is this uncommon, Mr. President." Legislative Journal—Senate, p. 385.

Sen. Lamb stated:

> "I think House Bill No. 2170, as it is before us today, is the product of years of study, and a long search by interested people into what we could do to meet the problem that the private schools are having in Pennsylvania with respect to just keeping their doors open." [p. 385]

The Bill passed the Senate 33 to 14.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1189

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee,

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF AMICUS

Protestants and Other Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with

national headquarters in the Washington, D.C. area, with some 100,000 members in all the states of the United States. Its sole chartered purpose is to preserve the principle of separation of church and state as set forth in the First Amendment to the Constitution of the United States and in the Constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Protestants and Other Americans United for Separation of Church and State, popularly known as "Americans United" has members in the Commonwealth of Pennsylvania and is especially concerned over any development in the state which raise questions of possible infringements of the Constitution of the Commonwealth of Pennsylvania but, more particularly, any possible violations of the religious clauses of the First Amendment to the Constitution of the United States.

This *amicus* brief takes the position that the Pennsylvania "Nonpublic Elementary and Secondary Education Act" is unconstitutional. This position is not motivated by any hostility to any particular church or to any particular religion. As the Maryland Court of Appeals said in the *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966):

> "It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

Amicus was a party plaintiff in the lower court, but having been held not to have standing as a party, now appears as *amicus*.

STATUTE INVOLVED

The "Nonpublic Elementary and Secondary Education Act," a statute of Pennsylvania, was adopted June 19, 1968 by the Legislature of the Commonwealth of Pennsylvania. (Act of June 19, 1968, No. 109; 24 P.S. (Purdon) 5601 et seq.) The act by its Title indicates, inter alia, that it is intended "to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic [church] schools." It designates a portion of the revenues of the State Horse Racing Fund as the source of funds to purchase secular educational services from, inter alia, church schools.

QUESTIONS PRESENTED

There are many questions presented in this litigation, all of which will be ably argued by counsel on both sides of the controversy, but *amicus* maintains that the most important and decisive issue is whether or not the act in question is consistent with or violative of the principle of separation of church and state embodied in the religious clauses of the First Amendment to the United States. Therefore *amicus* will emphasize the following questions presented by the Complaint and arising from the lower court opinion:

Does an act which uses a church and its church school "to promote the secular education of children of the Commonwealth of Pennsylvania"—assuming arguendo that the education of children in secular subjects is the purpose and primary effect of the act in question—violate the strictures of the establishment clause of the First Amendment to the United States Constitution? We believe the answer will be "yes".

Does the Pennsylvania "Nonpublic Elementary and Secondary Education Act create an impermissible, interdependence between religion and the state in violation of the rule, as found in *Abington School District v. Schempp*, 374

U.S. 203 (1963), which forbids "a fusion of governmental and religious functions or a concert or dependency of one upon the other?"

Do the religious clauses of the First Amendment to the United States Constitution, as extended to the States by the Fourteenth Amendment, make unconstitutional a state statute which uses churches or church schools as instrumentalities or agents to carry out an allegedly secular government purpose – namely the education of students in secular subjects?

Does the use of state funds to implement a merger of church and state resources to carry out a governmental program violate the taxpayer's right to be free of Establishment of Religion and his right to the Free Exercise of his religion? Does this union of church and state in a possibly secular education project violate the constitutional principle of separation of church and state?

STATEMENT OF THE CASE

The present suit seeks to enjoin the alleged unconstitutional approval and expenditure of State funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act. The complaint alleged the unconstitutionality of a statute of statewide application. A three-judge panel was convened. 28 U.S.C. §§ 2281-84. Jurisdiction was based on the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 28 U.S.C. § 1343. The three-judge panel, inter alia, granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted.

The individual plaintiffs are citizens and taxpayers of the Commonwealth of Pennsylvania and their claims were brought in that capacity. Plaintiff Lemon, in addition to being a citizen and taxpayer, is a Negro parent of a child attending public school in Pennsylvania. The organization plaintiff, Americans United for Separation of Church and

State, was held by the court below not to have standing as a party to the suit. Americans United does not care to argue this dismissal as to it and submits this brief *amicus curiae* in lieu of appeal.

The defendant Kurtzman is the Pennsylvania Superintendent of Public Instruction who is responsible for approving the allocation of funds under the Pennsylvania Education Act. Defendant Sloan is the State Treasurer of the Commonwealth of Pennsylvania who allocates the approved funds. The seven defendant schools are church schools situated within the Eastern District of Pennsylvania, which have contracted with the Commonwealth to furnish educational services as an instrumentality of the state under the Education Act.

The complaint has alleged as a fact that these church schools are religious in nature and are part of the educational apparatus of a church.

The Complaint was filed on June 3, 1969, together with a Motion for a Preliminary Injunction and an Order for the appointment of a three-judge court. On July 7, 1969 plaintiffs below filed interrogatories and a Motion to Produce under Rule 34 upon defendant schools. All discovery was stayed pending disposition of motions by defendants below, including motions to dismiss the Complaint for failure to state a claim and for lack of standing on the part of some of the plaintiffs. On November 28, 1969, after briefs and arguments, the District Court dismissed the Complaint, Chief Judge Hastie dissenting.

There are many procedural questions—or errors—involved in the premature dismissal of plaintiffs' complaint, but basically the question to be decided is whether the Pennsylvania Nonpublic Elementary and Secondary Education Act, No. 109 of June 19, 1968, 24 P.S. § 5601, on its face and construed in the light of certain factual allegations in the complaint, which must be deemed correct on a motion to dismiss the complaint, violates the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The court below erred in dismissing plaintiffs' complaint for failure to state a claim upon which relief could be granted. The error appears to have arisen from an over-reliance on the "purpose and primary effect" test first espoused by this Court in *Abington School District v. Schempp*, 374 U.S. 420 (1961). As the court below pointed out:

> "To distinguish between 'forbidden involvement of the State with religion and those contacts which the Establishment Clause permits' the Supreme Court states:
>
> 'The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U.S. at 222.'" (13 app.)

The court below applied this test to the Act—the Pennsylvania "Nonpublic Elementary and Secondary Education Act." It found:

> "We believe that the purpose of the Education Act can be found clearly on its face. The Legislature has declared that the purpose of the Education Act is 'to promote the welfare of the people of the Commonwealth of Pennsylvania' and 'to promote the secular education of children attending nonpublic schools." . . . "Administered within its narrow confines neither the primary nor the necessary effect of the statute advances religion."

Amicus recognizes that since the court rejected the opportunity to accept evidence as to the purpose and primary effect of the act, it made useless the test which in this case requires a hearing to determine the nature of an

allegedly questionable legislative act. The court did not "feel that it is necessary or appropriate to re-examine the legislative history of the Education Act in search of the 'true intent' of Pennsylvania's legislators." It really was not a question of an embarrassing disclosure of the "motives" of the legislators but the need for a searching inquiry into the purpose and the primary effect of the legislation (not the legislators). This is a sufficient error to require the matter to be reopened before a three-court panel.

Amicus will emphasize in its argument that if it should be shown that the purpose and primary effect of the Education Act was neither to aid nor inhibit religion, then the Act must pass or fail the "religious means" test also found in *Schempp*. Justice Brennen in *Schempp* clearly stated this additional general rule: ". . . government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." (p. 265) If, arguendo, it be admitted that the Education Act was designed to provide state funds to educate children in secular subjects (a public purpose now generally accepted) then it must also be admitted that the state has an extensive supply of nonreligious means to accomplish this purpose. It further follows that the Act fails to meet the constitutional standard, so often repeated and again reiterated as recently as *Board of Education v. Allen*, 392 U.S. 236 (1968)—"The constitutional standard is the separation of Church and State"—by failure to meet the "religious means" test. *Amicus* will substantially limit its argument to a discussion of the applicability of the "religious means" test.

ARGUMENT

THERE IS NO QUESTION BUT THAT THE PENNSYLVANIA NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT IS UNCONSTITUTIONAL UNDER THE STRICTURES OF THE FIRST AMENDMENT

There are two views of what has happened in the field of church-state relations with regard to government aid to educational institutions which teach and practice religion.

(1) Reacting to the difficult financial situation in which Roman Catholic and other church schools find themselves, Congress and many state legislatures including the legislature of the Commonwealth of Pennsylvania, have attempted to aid church schools by using government funds to pay for part of the costs of running parochial schools. Sympathetic with the religious efforts of parochial schools, fearful of the results on morality and public order which may result from a failure of religious education, Congress and these legislatures did desire to aid religion. The method chosen to aid religion was cloaked in secular language and the aid to religion was given indirectly rather than directly; or,

(2) Reacting to the need for an improved educational system throughout the nation and fearful lest the closing of parochial schools burden the public or common schools, and being impressed with the value of secular subjects, Congress and many state legislatures including the legislature of the Commonwealth of Pennsylvania decided to use church schools in concert with public schools to teach secular subjects—thus creating at state expense a dual system of private and church schools instead of a unitary system of common schools open to all regardless of race or religion.

In all cases, the statutory design is to limit the tax support to the teaching of secular subjects and to avoid religion. To the extent that the Act accomplishes this design its purpose and primary effect may, in fact, be "secular". Its primary effect is more likely to be damaging to religion than an aid to religion.

Of course, both purposes may be present at the same time, but both result in unconstitutional legislation—one aiding or hindering religion, the other using the church as an agent of government. Both are prohibited by the Establishment and Free Exercise clauses of the First Amendment.

Amicus will focus its attention on the state government's use of a church as its agent or instrumentality to accomplish a secular purpose. This device was first criticized by James Madison in his *Memorial and Remonstrance Against Religious Assessments*. This Supreme Court of the United States considered that document important enough to attach it as appendix to your opinion in *Everson v. Board of Education*, 330 U.S. 1 at 63. Written in 1785, this document opposed an Assessment Bill for religious instruction introduced the previous year in the Virginia General Assembly. In the interim, the *Memorial and Remonstrance* was circulated throughout the Commonwealth. Mr. Justice Frankfurter described this document as "an event basic in the history of religious liberty", *McCollum v. Board of Education*, 333 U.S. 203, 214 (1948), while Mr. Justice Rutledge stated "the Remonstrance is at once the most concise and the most accurate statement of the view of the First Amendment's author concerning what is 'an establishment of religion'." *Everson v. Board of Education*, supra at 37. In his *Memorial and Remonstrance*, Madison pointed out clearly: "We remonstrate against the said Bill, . . . because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or *that he may employ Religion as an engine of Civil Policy*. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world; *The second an unhallowed perversion of the means of salvation*." (Emphasis supplied.)

There we have the gist of the plaintiffs' complaint. The Pennsylvania Nonpublic Elementary and Secondary Education Act attempts to employ religion as an engine of civil policy and results in "an unhallowed perversion of the

means of salvation", as well as a breach of the United States Constitution. Madison made the further point: "Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not." (Writings of James Madison, (Hunt Ed.) Vol. II, pp. 183-191.)

The reason why there is any legal question at all is because of a misunderstanding of this Court's holding in *Board of Education v. Allen*, 392 U.S. 236 (1968), the dicta of which appears to condone the governmental financing of church schools, particularly the secular aspects of such education. The Supreme Court observed in *Allen*, supra, at 247-48:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

Now it is true that church schools have undertaken the task of secular education, and some claim to do so almost to the exclusion of religion. If this invasion of the field of religion by the government is allowed to continue, the payment of church personnel by the government for secular

activities may so divert churches from their religious functions as to completely destroy religion. This, of course, was one of the results of the mixture of church and state which Madison and most of the commentators have subsequently feared. This, too, the doctrine of separation of church and state, was intended to prevent.

If we review the statute in the *Allen* case, we quickly see that the books were to be furnished to the students and not to the churches. While close to the line, the Supreme Court in *Allen* did not have a case where, without equivocation, the aid was to the church or where the church school was made an instrumentality to carry out a "secular" purpose of the government. If, as a matter of fact, the aid is to the student and not to the church school, and if the authority used to carry out the secular purpose of the government does not make the church school substantially an agent of the government (the *de minimis* doctrine makes this test practicable), there is no church-state problem. And this is what we believe *Allen* was all about – and this is what happened in *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the parents were reimbursed, not the school; the parents were the agents of the government; the bus lines were benefitted, not the churches; and, finally, a secular purpose of the government was the safe transportation of children.

In *Tilton v. Finch*, decided in the United States District Court for the District of Connecticut, March 19, 1970, the Court applying the "purpose and primary effect" test associated with both *Everson* and *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), came up with a new reading of the religious clauses of the First Amendment: "The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes – not the nature of the institution, secular or religious, which receives the aid" (slip opinion at 13). Thus interpreted, *Tilton* would permit the government, state or federal, to assist church schools and to use church schools to carry out

the educational responsibilities of the state, provided only that the particular courses taught are secular and not religiously oriented. Referring to the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964), which grants federal funds to church-related colleges for construction of academic facilities, the Court stated: "The Act before us was carefully drafted to insure that grants made to church-related educational institutions would subsidize the secular rather than the religious functions of such institutions" (slip opinion, p. 15).

It does not take any great cerebration to realize what a pandora's box of religious strife will be opened if this new erosion of the principle of separation of church and state is permitted to undermine the foundation of the First Amendment. Any conceivable secular activity or function of a present-day church could be subsidized at taxpayer expense if it is the nature of the function rather than the nature of the institution which is the test for avoidance of the principle of separation of church and state. Gaston D. Cogdell, in his recent book, *What Price Parochiaid*, (1970), points out the intercreedal rivalries which this new gap in the wall of separation will generate:

> ". . . If tax money is to be used for 'nonsectarian, church activities, let not all of it be given to the Roman Catholic Church, with a tiny little bit going to a few others. Let's divide the public bounty fairly and equally between all the 258 different religious denominations in the country for their 'nonsectarian' buildings, activities and programs. Every one of the 258 different denominations must get its 'fair share' of the tax money now going almost wholly to the Roman Catholic Church for the non-sectarian functions which they perform for society, if there is to be any justice, fairness, equity, or honesty in the state's largesse to the institutions and activities of the various religious sects and their clergy." (p. 75)

Returning to *Board of Education v. Allen*, supra, that opinion can be read so as not necessarily to lead to a new principle that state aid to churches or state use of churches to carry out secular teaching programs is constitutional. The syllabus indicates what actually was involved, rather than what proponents of state involvement in church education or church involvement in state education would have us believe. Mr. Justice White in delivering the opinion of the Court stated as follows:

> "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically in the State. Thus no funds or books are furnished to parochial schools and the financial benefit is to the parent and children not to the schools." (392 U.S. 263 (1968))

In both *Everson* and *Allen*, great legislative finesse was used to avoid a situation where the aid went directly to the schools or where the church school system became an agent of the government to carry out its secular educational responsibilities.

The laudable purpose of aiding churches to relate their students to God and to educate in a religious environment cannot constitutionally be accomplished by the device of having the taxpayer pick up the tab for the cost of instruction at church schools. That desirable result can legally be attained by greater effort upon the part of the Roman Catholic Church and its followers without reliance upon the coerced generosity of the taxpayers of the Commonwealth of Pennsylvania.

It is fundamental that the use of religious institutions to achieve secular purposes clearly violates the First Amendment, at least in the absence of clear evidence that secular means are unavailable to achieve the same end. As Justice Brennan stated in *Abington School District v. Schempp*, 374 U.S. 203, 264-65 (1963), "Government may not

employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." Here the secular interests of the Commonwealth of Pennsylvania in the education of its children can be achieved by aid to its own fine public school system.

Since there are many different factual situations arising where it is necessary to determine whether a particular statute violates the strictures of the Establishment Clause, the courts have devised several "tests" to be applied as the need arises. The classic rule and accompanying "test" is found in *Everson v. Board of Education*, supra (1947), where the court stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. *Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'*" (Emphasis supplied.) (pp. 15-16)

This rule or test obviously covers a great many different situations where the government acts: (1) so as to set up a church; (2) to aid one particular religion; (3) aid all religions or religions in general; (4) prefer one religion over

another; (5) require a person to go to church; (6) require a person to stay away from church; (7) force a person to profess a belief or disbelief in any religion; (8) to punish a person for entertaining or professing religious beliefs or disbeliefs; (9) to punish a person for church attendance or non-attendance; (10) to use tax funds to support religious activities; (11) to use tax funds to support religious institutions which practice or teach religion; (12) to become involved or participate in the affairs of religious groups; (13) or to permit churches to participate in state affairs, as "churches."

In the present case, the stated purpose of the Act is set forth at length in its "Title" and "Legislative finding, declaration Of Policy" (24-25 app.). The stated purpose is quite clear: "to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools." But can such an Act be held not to have as its purpose or not to have a primary effect that neither advances nor inhibits religion?

This test was useful to Chief Justice Warren in *McGowan v. State of Maryland*, 366 U.S. 420 (1961), in analyzing certain "Sunday" legislation:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment Clause' if it can be demonstrated that its purpose – evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect – is to use it for its coercive power to aid religion."

The Court's latest statement in *Allen* is as follows:

> "Based on Everson, Zorach, McGowan, and other cases, Abington School District v. Schempp, 374 U.S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:
>
> " 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of reli-

> gion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education,' 374 U.S. at 222."

That Justice Clark who articulated the "purpose and primary effect" test did not expect it to be used in lieu of but in addition to the *Everson* and other tests is clear from his Law Review article in the South Carolina Law Review:

> "The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; *and where there is some working arrangement between the two . . .*" (15 S.C.L.Rev. 855, 859 (1963)) (Emphasis added.)

It is crucial to understand that the *Schempp* test *is not to be used exclusively in all situations involving a state relationship with a church institution.* It is only useful in those situations where there is a question about what the purpose of a particular statute is or what, in practice, the statute actually accomplishes. For one example, it was most useful in *McGowan v. State of Maryland,* 366 U.S. 420 (1961), which required the court to determine the constitutionality of certain "Sunday Closing" Laws. This required a study of what the legislators had in mind when they adopted the legislation. The court correctly stated the test and applied it:

> "Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes

> solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state."

Likewise in *Allen*, the problem arose as to whether Section 701 of the Educational Law of the State of New York actually had among its purposes to aid religion, to use church schools as agencies of government, or to put the government in partnership with church schools to carry out its secular educational responsibilities. The court applied the *Schempp* test and found as a matter of fact that it was neither the purpose nor primary effect of the statute to aid any church school. Mr. Justice White stated:

> "This test is not easy to apply, but the citation of Everson by the Schempp Court To support its general standard made clear how the Schempp rule would be applied to the facts of Everson. The statute upheld in Everson would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."

The discussion in *Allen* of the fine secular job some church schools were doing had no relevance to the decision.

In *Walz v. Tax Commission*, 397 U.S. 664 (1970) Chief Justice Burger used the *Schempp* "purpose and primary effect" test to determine whether a New York statute and state constitutional provision granting tax exemption to the worship function properties of churches constituted an aid to religion contrary to the Establishment Clause. The Justice first determined that tax exemption is not such an "aid", pointing out: "It is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions" (slip opinion p. 8). He then found "that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion." Then he took the final step: "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." This is an example of how the "purpose and primary effect" test can be applied to analyze a state constitutional and statutory provision to determine whether there is an aid or inhibition of religion contrary to the Establishment Clause of the First Amendment.

However, in *Walz*, Chief Justice Burger did not forego the other important tests. Under *Everson*, statutes are to be tested and found wanting if they result in participation (involvement) by the State or Federal Government in the affairs of religious organizations. The exact wording of that part of the multiple rule is: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa." (*Everson v. Board of Education*, 330 U.S. 1 at p. 16). The majority opinion in *Walz* further contains a clear warning against direct money support by states of church activities. The financial realtions of the church and state here under consideration resulting from the Pennsylvania Nonpublic Education and Secondary Education Act are an example of such unconstitutional involvement. Chief Justice Burger wrote: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encom-

pass sustained and detailed administrative relationships for enforcement of statutory and/or administrative standards. . . ." (slip opinion p. 9)

The *Schempp* or "purpose and primary effect" test has no useful role to play in a situation where there is no question as to the purpose or effect of the particular legislation nor is it needed in any case where the statute makes a church a partner, agent, instrumentality or "engine"—as James Madison would have put it—of civil policy. Here the pleadings show that the Commonwealth of Pennsylvania employs church schools to teach secular subjects to students whom the state has an admitted obligation to teach at public schools. This is not controverted. Even if one accepts the incredible proposition that the underlying purpose of the legislature was not to aid religion but to teach secular subjects only, to raise the educational standards for secular subjects only, to benefit students without helping church schools in their basic responsibility of teaching and practicing religion, and that this is a proper public secular purpose of the state, nevertheless, the Commonwealth of Pennsylvania still may not use a church to carry out these functions especially where secular means will obviously suffice. Mr. Justice Brennan concurring in *Schempp*, supra, stated this additional rule:

> "Equally the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) *use essentially religious means to serve governmental ends where secular means would suffice.*" (p. 231) (Emphasis supplied.)

This court might well have in mind the prediction of Professor Paul A. Freund of Harvard in *Public Aid to Parochial Schools* (74 Case and Comment 4, (1969)), where he writes: "Arguing that the aid in the New York case was sustained because it was available neutrally to pupils in all accredited schools, the proponents are likely to insist that

such aid is not merely permissible, but is mandatory, since the First Amendment enforces just this standard of neutrality among religions and between a religious and a secular promotion of a common public purpose" (p. 4). There are cases pending in Missouri and California which seek to require State support of church schools similar and equal to the support given to the public school system!

Mr. Justice Frankfurter in his concurring opinion in *McCollum v. Board of Education*, 333 U.S. 203 (1948), repeated the principle: "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally" (p. 227). Similarly in *Schempp*, the Supreme Court held:

> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits." (p. 222)

Now it is clear that the State may perform services for the church—just as for any other nonprofit organization within its jurisdiction, provided the services are governmental in nature and are not intended to aid the church as a church in its functions. But in determining what services the state can supply a church, we must see to it that in the process the church does not become an agent of the government, a conduit, a "civil engine," an agent. It may be the recipient of a service enjoyed by all institutions regardless of being a church or otherwise, such as fire and police protection. The state may at a church put out a fire, inspect a faulty roof, or apprehend a vandal, but it may not use a church (or pay church employees) to perform these services. Such services churches are entitled to receive, in effect, as citizens, but not to perform as government instrumentalities! But here the design is to use the church to

carry out a secular purpose of the government for others. The state uses the church as an agent of the government in its role as educator. This, as was shown in *Everson* and criticized in Madison's *Remonstrance*, the State cannot do! The State is not without constitutional means to carry out these laudable public purposes, it can use public libraries and public schools and independent (nonchurch) private schools just as easily—thoroughly practicable constitutionally permissible alternatives.

The relationship between church and state in the "modern welfare state" is a most delicate one. The federal constitution has been construed to provide for such a State. The Commonwealth of Pennsylvania is also a "welfare state." Any judgment as to whether or not a particular program of public welfare actually promotes the general welfare is left to the Congress or to the state legislatures, with one or more important exceptions. The exception here pertinent is that the "establishment clause" forbids a merger of church and state to accomplish a welfare function. The church may not be used as "an engine of civil policy" no matter how effectively welfare would be promoted by such a device. Who is to say that complete support by the government of the church as the representative of God on earth would not be the highest form of welfare, the greatest possible child benefit? If the teachings of some of the major religions are true, it is inescapable not to conclude that taxpayer support of one particular church—the one which has the correct path—is the finest type of "welfare" and child benefit, too, but which one? The founding fathers, led by Jefferson and Madison, conceived of the "limitarian state"—one where the power to undertake certain activities is prohibited to the State. The establishment clause of the First Amendment accomplished just this limitation. Welfare, yes—but not when achieved by the support of religious institutions directly or indirectly, for good or bad. Both the church and the state may most properly pursue the general welfare but not as instrumentalities of one another. Competitors in doing good, yes; agents, no!

In conclusion, Robert G. Dixon, Jr., in his informative article, *Religion, Schools and the Open Society* (13 Journal of Public Law, No. 2, p. 305 (1965)), points up the grave impact on the American way of life involved in efforts to bring state and federal support to churches and their schools:

> "The great threat to continuation of the separation of the church and state tradition, and the open society values which are vitally associated with it, lies not in such things as recitation or nonrecitation of prayers in public schools, religious observances in their public place, or exemption from some public norm or duty on ground of religion. The threat lies rather in a disposition toward self-segregation, and in claims for public support, on the part of sectarians. A society in which there are schools, scout troops, and youth or welfare organizations existing simply as such, without special identification or division, is one kind of society. A quite different kind of society results if these same components, or a substantial percentage of them, become self-consciously hyphenated and take on an identity as a Roman Catholic school, a Lutheran scout troup, or a Jewish welfare program. We do not want the psychology and philosophy of Quebec to spread sectionally and cross-sectionally across all American life and institutions. An oppressed minority can be expected to stick together and to ghettoize because of external pressure and nonacceptance. Persistence in such practices after there has been a flowering both of numbers and acceptance is to violate the moral command of Kant's categorical imperative. It is to pursue a policy which, if pursued by all, would result in the destruction of the open and common society we have known." (p. 306)

The language in the separate opinions in *McCollum v. Board of Education*, 333 U.S. 203 (1948), sums up our argument. Let us be mindful of the wise words of Mr. Justice Frankfurter who stated:

"Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. 'The great American principle of eternal separation'—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity."

CONCLUSION

For the reasons above stated, the judgment of the District Court panel of three judges of the Eastern District of Pennsylvania dismissing the appellants' Complaint should be reversed and remanded for a hearing on the merits, with an opinion on the principles of constitutional law involved.

Respectfully submitted,

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Amicus Curiae

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May 27, 1970

APPENDIX.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA.

Before WILLIAM H. HASTIE, *Chief Judge, Circuit Court,*
ALFRED L. LUONGO and E. MAC TROUTMAN, *Judges,*
District Court

OPINION AND ORDER.

TROUTMAN, *J.*

The present suit seeks to enjoin the alleged unconstitutional approval and expenditure of State funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act[1] (hereinafter the Education Act). Since the complaint alleges the unconstitutionality of a statute of statewide application, this three-judge panel has been convened. 28 U.S.C. §§ 2281-84.[2]

Jurisdiction is based on the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 28 U.S.C. § 1343. Presently before the Court are defendants' motions to dismiss for lack of standing and for failure to state a claim upon which relief can be granted.

The individual plaintiffs are citizens and taxpayers of the Commonwealth of Pennsylvania and their claims are brought in that capacity. Plaintiff Lemon, in addition to being a citizen and taxpayer, is a Negro parent of a child attending public school in Pennsylvania. The organizational plaintiffs are associations of persons resident in the Commonwealth of Pennsylvania which "share as a common objective the separation of Church and State and the opposition to the use of public funds for the support in whole or

1. Nonpublic Elementary and Secondary Education Act, 24 P.S. § 5601 et seq. (Supp. 1969). The complete text of the statute appears in Appendix A, *infra*.

2. See *Ex parte Bransford*, 310 U.S. 354 (1940).

in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion."[3] The National Association for the Advancement of Colored People, (NAACP) with which the plaintiff, Pennsylvania State Conference of the NAACP, is affiliated, "is an organization whose purpose is to seek the elimination of racial discrimination through resort to judicial proceedings and otherwise".[4] Each of the organizational plaintiffs asserts its standing to sue as a party-plaintiff in the instant suit.

The defendant Kurtzman is the Pennsylvania Superintendent of Public Instruction who is responsible for approving the allocation of funds under the Pennsylvania Education Act. Defendant Sloan is the State Treasurer of the Commonwealth of Pennsylvania who will allocate the approved funds. The seven defendant schools are sectarian elementary and secondary educational institutions situated within the Eastern District of Pennsylvania, who have contracted with the Commonwealth for the purchase of secular educational services under the Education Act.[5]

I.

The Nonpublic Elementary and Secondary Education Act.

The Education Act was signed into law by the Governor of Pennsylvania on June 19, 1968. The Act empowers the State Superintendent of Public Instruction to contract for the purchase of "secular educational services" from

3. Complaint at p. 2.

4. Complaint at p. 2.

5. The Pennsylvania Association of Independent Schools (PAIS) has been permitted to intervene as a party-defendant for the limited purpose of arguing the defendants' motion to dismiss.

nonpublic schools located in the Commonwealth of Pennsylvania which fulfill the compulsory school attendance requirements under Pennsylvania law.

In its legislative findings and declaration of policy[6] the Pennsylvania Legislature has determined that a crisis exists in elementary and secondary education in Pennsylvania due to rapid increases in costs and school population and consequent demands for more teachers and facilities. It was also found that twenty per cent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's compulsory school attendance laws in nonpublic schools. It has been further recognized that elementary and secondary education constitutes a public welfare purpose and that nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of this public purpose. The Legislature, therefore, concluded that it is a governmental duty to support the achievement of this public welfare purpose by supporting the purely secular objectives of nonpublic education.

Briefly, the operational scheme of the statute permits the Superintendent of Public Instruction to enter into contracts[7] with nonpublic schools, whether sectarian or nonsectarian, for the purchase of "secular educational services". These "secular educational services" are defined[8]

6. 24 P.S. § 5602, Appendix A, *infra*.

7. The Pennsylvania Supreme Court has recognized that the State may contract with sectarian institutions for the purchase of needed public services. *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507 (1956). Furthermore, Pennsylvania has also recognized that such contracts are not "appropriations" to aid such organizations under the Pennsylvania Constitution, Art. III, § 29. *Schade, supra;* see also *Commonwealth v. Perkins,* 342 Pa. 529 (1941). Apparently, the reason for adopting a contractual method for carrying forth the aims of the Education Act was to avoid possible conflicts with the strictures of the Pennsylvania Constitution. Regardless of the method employed to distribute funds under the Education Act, the constitutional result we reach today would not be changed. As long as the purpose and primary effect of the statute neither advances nor inhibits religion, the constitutional standard is satisfied.

8. All definitions appear in 24 P.S. § 5603, Appendix A, *infra*.

to mean "providing of instruction in a secular subject", while secular subject is defined as "any course which is presented by the public schools of the Commonwealth and shall not include any subject-matter expressing religious teaching, or the morals or forms of worship of any sect". All purchases of secular educational services under the Education Act are to be at the "actual cost" of three items of such service: teacher salaries, textbooks and instructional materials. The Education Act further limits all purchases of secular educational services to courses in mathematics, modern foreign languages, physical science, and physical education.[9] As a condition for payment under the Act, the Superintendent of Public Instruction must approve all textbooks and instructional materials employed in the instruction rendered. In addition, a satisfactory level of student performance in standardized tests must have been attained and within five years of the date of the Act all secular educational services for which reimbursement is sought must be rendered by teachers holding State certification equal to the standard for teachers in public schools.[10]

Payment under the Act in discharge of the contractual obligation may be made only after service has been rendered. Section 5607(a) provides in relevant part that:

> Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought

9. The definitions in the "Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act" provide that "Secular educational service purchased under this Act shall consist solely of courses in the subjects of mathematics, modern foreign languages, physical science, and physical education". Definition 8 at p. 3.

10. See 24 P.S. § 5604, Appendix A, *infra*.

in reimbursement. Such account shall be subject to audit by the Auditor General.

Funds for the operation and administration of the Education Act are to be drawn only from the nonpublic elementary and secondary education fund. The monies comprising this fund are to be taken exclusively from the proceeds of State horse racing and harness racing.[11]

Defendants, in their brief, have informed the Court that 1181 nonpublic elementary and secondary schools in Pennsylvania, having a total pupil population of 535,215 children, and located in 55 of Pennsylvania's 67 counties, are now under contract with the Commonwealth pursuant to the Education Act. *One year's performance under contract has now been rendered and, on September 2, 1969, the Commonwealth paid its first quarterly installment obligation.*

II.

Standing of the Individual and Organizational Plaintiffs.

The defendants have moved pursuant to Rule 12(b) to dismiss plaintiffs' complaint on the grounds that both the organizational and individual plaintiffs lack standing to maintain the instant suit under the religious clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment.[12]

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11. Section 5606 of the Act prohibits the use of any monies raised by the Commonwealth for the support of the public schools to pay for services or administrative costs under the Education Act. In December, 1968, extensive regulations were promulgated by the Superintendent of Public Instruction which further delineate the details and operating procedures of the Act and further elaborate its secular, fiscal, and quality controls.

12. For the purposes of standing, we consider plaintiffs allegations under the Civil Rights Act, 42 U.S.C. § 1343, to be substantial —equivalents to the equal protection claims raised. We have made, therefore, no separate analysis of standing under the Civil Rights Act, but rather treat these contentions in our analysis of standing under the equal protection clause.

A. Organizational Plaintiffs.

The organizational plaintiffs assert their standing solely on the ground that they are organizations established for the purposes of either maintaining the separation of Church and State or preventing racial discrimination. Nothing further is alleged with respect to the issues of the instant case than the fact that these organizations share a common interest in the outcome of this suit as it may or may not comport with their particular organizational goals. The fundamental aspect of standing, as recently articulated by the Supreme Court, is that "it focuses on the party seeking to get his complaint before a federal court . . ." *Flast v. Cohen*, 392 U.S. 83, 99 (1967). The *Flast* decision further noted that "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a *personal stake* in the outcome of the controversy' . . . and whether the dispute touches upon '*the legal relations of parties having adverse legal interests*. . . .'" *Flast v. Cohen, supra*, at 101. (Emphasis added.)

On the basis of the allegations set forth in the complaint as they pertain to the organizational plaintiffs, we can perceive of no *personal stake* or *adverse legal interests* of these plaintiffs which demonstrate their standing as *parties* to the instant suit. Regardless of the good motives of these organizations, the mere fact that the instant case may result in a decision which may be in accord with or adverse to the respective general purposes of these organizations we believe is insufficient to establish standing to sue as an affected party in interest.[13] Consequently, the organizational plaintiffs have failed to establish standing as to

13. The organizational plaintiffs have argued that they should be permitted to sue here as private attorneys general. The Court, however, perceives no precedent or persuasive reason to adopt this theory in the instant case. Indeed, to do so may result in the rendering of an advisory opinion on a constitutional matter in contravention of Article III of the Constitution. See *Muskrat v. United States*, 219 U.S. 346 (1911).

both the religious and equal protection issues involved in the instant case.

B. Individual Plaintiffs.

The individual plaintiffs, Alton Lemon, Priscilla Reardon and Betty J. Worrell, assert standing under the religious clauses of the First Amendment and the equal protection clause based upon varied allegations of status as to each issue.

Initially, it is alleged that all individual plaintiffs are taxpayers of the Commonwealth of Pennsylvania. Plaintiff Lemon alleges he has paid an admission fee to a Pennsylvania race track. Such fees provide the sole financing of the Education Act. The other individual plaintiffs have not alleged payment of such admission fees.

As to plaintiff Lemon's standing as a taxpayer under the establishment and free exercise clauses of the First Amendment, again we note that the focus is on the party asserting his claim. In this respect, however, "[i]t is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen,* supra, at 103. Although the *Flast* decision concerned itself with the status of a federal taxpayer to challenge a federal spending program under the establishment and free exercise clauses of the First Amendment, we consider that its requirements as to standing apply as well to state taxpayers. *Flast* dictates two requirements for taxpayers standing, namely that: "First the taxpayer must establish a logical nexus between that status and the type of legislative enactment attacked" 392 U.S. at 102, and "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged". 392 U.S. at 102. In *Flast,* both elements were satisfied since it was alleged that the taxing and

spending powers of the federal government were being used in excess of the specific constitutional limitations imposed upon their exercise by the First Amendment. See 392 U.S. at 103. Since the First Amendment applies to State governmental powers, *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the exercise of State taxing and spending is equally limited. These are precisely the allegations made by plaintiff Lemon in the instant case. We, therefore, hold that he has by these allegations demonstrated standing to challenge the Education Act under the establishment and free exercise clauses of the First Amendment.

The other individual plaintiffs assert generally that they are taxpayers in Pennsylvania. However, they have not alleged the payment of any tax which would bring them within the class of affected taxpayers. *Doremus v. Board of Education,* 342 U.S. 429 (1952); *Murdock v. Pennsylvania,* 319 U.S. 108 (1943). Rather, these plaintiffs allege that they have not paid an admission fee to a Pennsylvania race track because to do so would require them to pay tax for the support of religion in violation of their rights of conscience. The personal right to freedom of conscience is protected by the free exercise clause of the First Amendment and the State may not condition other rights or privileges upon the sacrifice of this freedom. See *Sherbert v. Verner,* 374 U.S. 398 (1963); *Torcaso v. Watkins,* 367 U.S. 398 (1961). Although the privilege to attend a race track here asserted and its connection to free exercise is less apparent than in either of the above cited cases, we will recognize it for the purpose of establishing the standing of these plaintiffs.

The remaining question is whether any of the individual plaintiffs have standing to challenge the Education Act on equal protection grounds. It is alleged generally in the complaint that the private schools which have contracted or will contract with the Commonwealth under the Educa-

tion Act intentionally discriminate in the selection of students and/or teachers or are de facto segregated by race or religion. It is further alleged that the funds allocated by the Commonwealth to these schools under the Act will be used to perpetuate and support these practices and as such there is State action involved. We will assume for the purpose of deciding this aspect of the standing issue that these alleged facts could be proved at a hearing on the merits. Nevertheless, these plaintiffs lack standing to challenge the Education Act under the equal protection clause of the Fourteenth Amendment.

The Education Act on its face does not use religion or race as a standard or guideline to determine who may enter into a contract with the Commonwealth. As such the Act itself does not purport to make any classifications to deny equal treatment to members of any particular race or religion. As we previously noted, the requirement of standing focuses on the party affected and his personal stake in the outcome of the litigation at issue. Plaintiff Lemon asserts his status as a Negro and parent of a child in a public school in Pennsylvania. However, there is no allegation in the complaint which asserts that Lemon or his child is personally affected by any alleged intentional discrimination or de facto segregation in these schools. There is no allegation that Lemon's child attempted to enroll at any of these schools and was denied admission because of race or religion. None of the other plaintiffs' allegations point to any interest, parental or otherwise, which has been or may be affected by the alleged discriminatory practices. The absence of an allegation that the personal rights of these parties are affected has the net effect of seeking to raise hypothetical grievances of others who *may be* personally injured by such discrimination. Standing requires at least that the plaintiff himself be personally affected.

Flast, supra, at 110. See also *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Race is indeed a relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies or laws where he himself was not the object of such practice.[14] Consequently, as none of the individual plaintiffs have alleged a personal stake in the instant case, they have failed to establish standing under the equal protection clause.

III.

Establishment and Free Exercise.

We consider now the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted. In this posture of the case we accept as true all well-pleaded allegations of fact in the plaintiffs' complaint. The plaintiffs allege as a fact that the purpose and primary effect of the Education Act is to aid religion. For the purpose of considering the motion to dismiss it is argued that the allegation of the purpose and primary effect of the Education Act in the complaint must be deemed admitted. While it is true that well-pleaded facts in the complaint are deemed admitted for the purpose of testing its sufficiency, such an admission does not include legal conclusions drawn from these facts. *Newport News Co. v. Schauffler*, 303 U.S. 54, 57 (1937); *Pauling v. McElroy*, 278 F. 2d 252, 253-254 (D.C. Cir. 1960). We believe that the allegation asserts not a fact but a conclusion of law and as such is not admitted for purposes of testing the sufficiency of the complaint. The question of law then

14. *See e.g. Burton v. Wilmington Parking Authority*, 365 U.S. 716 (1961); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963) *cert. denied* 376 U.S. 938 (1964); *Deal v. Cincinnati Board of Ed.*, 369 F.2d 55 (6th Cir.) *cert. denied* 389 U.S. 847 (1966).

presented is whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion.[15]

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This limitation originally placing a restriction only on federal governmental involvement in religion has since been judicially incorporated into the Fourteenth Amendment and now represents a bar on State as well as Federal action. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The meaning and scope of the First Amendment have been elaborated several times by the decisions of the United States Supreme Court in areas involving education. Most apposite to the instant case are the Supreme Court's decisions in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 336 (1968). In *Everson*, the Supreme Court held that a New Jersey statute which authorized State reimbursement to parents for bus fares of children attending both public and parochial schools did not violate the establishment clause of the First Amendment. The Court noted that the establishment clause prohibits the states from setting up a church or supporting the religious activities of sectarian institutions. 330 U.S. at 16. However, the Court further observed that a State may not hamper citizens from receiving the benefits of public welfare legislation by excluding religions from its benefits. *Id.* The

15. More specifically, with respect to the establishment clause, in paragraph 18 of the complaint it is alleged that the Act (1) "has as its purpose the advancement of religion", and (2) "finances and participates in the blending of sectarian and secular education", (3) "provides for direct financial aid out of State funds to sectarian schools", and (4) "has as its primary effect the advancement of religion".

First Amendment "requires the State to be neutral in its relations with groups of religious believers and non-believers. . . ." 330 U.S. at 18. As bussing was generally in the same category as other government services provided to parochial schools such as ordinary police and fire protection, sewage disposal, public highways and sidewalks, this measure of aid, as it benefited school children, could be constitutionally extended without breaching the standard of government neutrality toward religion embodied in the First Amendment.

Most recently, in *Board of Education v. Allen*, 392 U.S. 236 (1968) the Court sustained, over First Amendment objections, legislation in New York which required the State to lend textbooks free of charge to all children in private sectarian and non-sectarian schools. The Court recognized that "*Everson* and later cases have shown that the line between State neutrality to religion and State support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree'. Zorach v. Clauson, 343 U.S. 306, 314 (1952). See McGowan v. Maryland, 366 U.S. 420 (1961)". *Id.* The Court re-examined its prior decisions and articulated a pragmatic standard, first espoused in *Abington School District v. Schempp*, 374 U.S. 203 (1963), by which to test legislation designed to achieve a public objective through religiously affiliated educational institutions. To distinguish between "forbidden involvement of the State with religion and those contacts which the Establishment Clause permits" the Supreme Court stated:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that

> to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U.S. at 222.

Although the results of the *Everson* and *Allen* decisions were to provide some measure of indirect aid to parochial schools in that transportation to receive religious instruction was facilitated and that the parochial schools' funds were no longer required to purchase certain books, such results did not constitute a breach of State neutrality towards religion. In applying the purpose and primary effect test to the New York statute in *Allen*, the Supreme Court reasoned that "[t]he express purpose of section 701 was stated by the New York legislature to be furtherance of the educational opportunities available to the young. . . . The law merely makes available to all children the benefits of a general program to lend books free of charge." 392 U.S. at 243. Although a distinction between bussing and books was recognized, since the latter may be used as a vehicle of religious teaching, the Court noted that the language of the New York statute neither authorized nor permitted loans or distributions of religious literature. Properly, the Court was not willing to assume that New York's administrators would violate the terms of the statute; accordingly, it was held that the principal of neutrality was satisfied and the primary effect of the statute was not to advance religion. See 392 U.S. at 244, 245.

It is here argued that Pennsylvania's Education Act has as its purpose and primary effect the advancement of religion. We believe that the purpose of the Education Act can be found clearly on its face. The Legislature has declared that the purpose of the Education Act is "to promote the welfare of the people of the Commonwealth of Pennsylvania" and "to promote the secular education of children

attending nonpublic schools". Support for this declaration of purpose is found in specific legislative findings which point to the percentage of school-age children educated in Pennsylvania's private institutions, the rising cost of education, increased school population and demands for more qualified teachers and adequate facilities. Furthermore, the Legislature also recognized the potential financial burden on the public treasury and long-range impairment of education which may result if private institutions no longer bear their present educational burdens. The plaintiffs argue that because the vast majority of schools which will contract for the purchase of secular educational services under the Education Act are sectarian schools, the purpose or operative effect of the instant statute must be to support religion. We cannot accept the plaintiffs' argument. "The fact that a State law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a Legislature has erroneously appraised the public need." *Everson v. Board of Education*, 330 U.S. at 6. The purpose of the statute on its face indicates that "[the State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded". 392 U.S. at 247. The plaintiffs urge that we re-examine the legislative history of the statute and contend that such an examination will disclose that the true intent of the Pennsylvania legislators was to aid religion. We do not, however, feel that it is necessary or appropriate in the instant case to re-examine the legislative history of the Education Act in search of the "true intent" of Pennsylvania's legislators. The legislative findings of the State are not to be lightly set aside. In this connection, Mr. Justice Frankfurter has observed that:

> [T]he private and unformulated influences which may work upon legislation are not open to judicial probing.

> "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." McCray v. United States, 195 U.S. 27, 56. "Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." (Citations omitted.) *McGowan v. Maryland*, 366 U.S. at 496.

The education of our nation's children quite properly has been recognized by the Supreme Court as a proper subject of legislation enacted in furtherance of a public interest. *Cochran v. Board of Education*, 281 U.S. 370 (1930). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning; rather, educational goals may effectively be satisfied through private education. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As a sensible corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory education laws through private educational institutions, the *Allen* Court observed:

> [I]f the State must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular educational function. 392 U.S. at 236.

We recognize that "private education . . . is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," 392 U.S. at 247, and that the public's reliance on private education suggests that adequate *secular* education is being provided in these schools. We further recognize, as did the Supreme Court in *Allen*, that the "State's interest in education may be suf-

ficiently served by reliance *on the secular teachings which accompany religious training''* in nonpublic schools. 392 U.S. at 245. Furthermore, we consider that "religious schools pursue two goals, religious instruction and secular education", 392 U.S. at 245, and we believe that the State may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Education Act on its face authorizes the Commonwealth to contract only for services connected with the *strictly secular* function of educating Pennsylvania's school children in the secular subjects of mathematics,[16] physical sciences,[17] modern foreign language,[18] and

16. In the Regulation to the Education Act mathematics is defined as follows:

12. "Mathematics" shall mean the science of numbers and their operations, interrelations, combinations, generalizations, and abstractions, and of space configurations and their structure, measurements, transformations, and generalizations. It includes the study of number, space, and structural patterns. Branches of mathematics include arithmetic, algebra, geometry, trigonometry, calculus, analysis, probability, statistics, logic, and number theory.

17. Physical Science is defined as

15. "Physical science" is organized knowledge about the physical composition and structure of phenomena and the process of relating quantitative or qualitative description of physical phenomena related to time, space, mass, or derived concepts in a manner that is in agreement with all observed properties of these phenomena. "Physical science" includes the basic sciences of chemistry, physics, astronomy, geology, physical oceanography, and meteorology as well as the areas of specialization derived from these.

18. Modern foreign languages does not include the teaching of traditional church related classic languages such as Latin or Greek.

13. "Modern Foreign languages" is a term collectively applied to the study of pronunciation, grammar, composition and reading of foreign languages in contemporary use, as contrasted with that of the ancient, or "dead", languages commonly called the classics.

physical education.[19] That the Commonwealth must not be involved in the religious functions of sectarian educational institutions is clearly established by the nature and kind of strictly secular subjects selected in the statute itself and the controls and restrictions placed upon the statute's operation by the regulations promulgated thereunder. Thus limited and restricted we cannot hold that the statute advances religion either in purpose or primary effect. Moreover, the statute applies to *all* nonpublic schools both sectarian and non-sectarian. As it may apply to sectarian institutions, we concur with the Supreme Court's statement in Allen, supra, that "*we cannot agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." (Emphasis added.) 392 U.S. at 248.

Administered within its narrow confines neither the primary nor the necessary operative effect of the statute advances religion. It is quite unlike the situation where State tax-supported public school buildings, facilities and teachers are used as a forum and means for the dissemination of religious doctrines at times and on occasions when

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19.

14. "Physical education" refers to that part of the school program which provides guidance and instruction through physical activities designed to meet the needs of pupils in developing their physical efficiency and recreational skills, and, along with other phases of the curriculum, provides maximum opportunity for growth physically, mentally, emotionally, and socially. It includes adaptive physical education for those pupils who, because of health reasons, are unable to participate in regular classes. "Physical education" does not consist of instruction in music, driver education, military training, or extramural or interscholastic athletics and/or sports. Health instruction is not considered physical education.

Physical education does not include sex education or other areas which may be deemed religiously oriented.

pupils are subject to the State's compulsory attendance laws. *McCollum v. Board of Education,* 33 U. S. 203 (1948); *Abington School District v. Schempp,* 374 U.S. 203 (1963); *Engel v. Vitale,* 370 U.S. 421 (1962). On the contrary, the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. The statute is further limited and confined to the purchase of services at cost. Unlike *Schempp* and *Engel* the statute here maintains a position of complete *religious* neutrality. In *Zorach v. Clauson,* 343 U.S. 306, the Court approved the State's encouragement of "religious instruction" and its cooperation "with religious authorities".[20] Here the Education Act does not go so far as to encourage the teaching of religious matter. We recognize that the separation of Church and State embodied in the non-establishment principle is not a self-defining concept. The increasing national concern for education in our society, coupled with the public awareness that private schools are performing a significant public service in educating great numbers of school-age children, necessarily makes the State interested in private education. Of necessity therefore:

> As the State's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Most aim at human good, and in their respective views of what is good for many they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay. McGowan v. Maryland,

20. The Court in *Zorach* stated:

When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . 343 U.S. at 313.

366 U.S. 420, 462 (1966). (Separate opinion of Mr. Justice Frankfurter).

That such a common interest in education exists is desirable if not essential to the continued existence of a free society so long as the State's function is, as here, carefully defined, limited and confined to secular as opposed to sectarian matters. We do not view the First Amendment as requiring an absolute separation between necessarily overlapping interests in the secular education of school-age children. To require such a standard would assume that the State and religion exist in mutually exclusive and sharply defined spheres having no common natural interest in the education of our youth. Such a view would not comport with the extension of even police or fire protection or other governmental services in the public interest.

Nor do we find persuasive the argument that the child must be the direct beneficiary of government funds which support secular education. Such an approach would place form over substance in that a constitutional result would depend upon minute distinctions and technicalities. The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers. In our view the constitutional result should not and cannot wholly depend upon the identity of the payee. The use to which the funds are put must be the primary concern.[21]

The mandate of the First Amendment is neutrality with respect to religious teachings, beliefs and practices. The Education Act does not employ religion as its standard. The prerequisites to receiving government funds for the

21. The Supreme Court in *Allen* implicitly recognized this when it noted the secular books on loan under New York's statute were ordered and stored by the parochial schools but were furnished for the *use of individual students*. As such this secular use was in conformity with the Constitution. 392 U.S. at 244 n.6.

purchase of secular educational services, we believe, are designed to maintain the neutrality required by the First Amendment. While it may be argued that the consequential result of the instant statute may be to indirectly benefit nonpublic sectarian schools, the purpose and primary effect of the Education Act is secular in nature and such an incidental benefit is not sufficient to infringe upon the non-establishment principle of the First Amendment. As was noted by Mr. Justice Harlan, concurring in *Board of Education v. Allen*, supra:

> [W]here the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State, and where the activity does not involve the State, 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom . . . it is not forbidden by the religious clauses of the First Amendment. 392 U.S. at 249.

Admittedly, the line is not an easy one to draw. However, we believe the Education Act is consistent with neutrality towards religion and comes within the permissible limits and spirit of the non-establishment principle. Consequently, we will dismiss the plaintiffs' complaint under the establishment clause.

Plaintiffs also allege in their complaint that the Education Act on its face and in its necessary operative effect denies them the free exercise of religion. With respect to each of the plaintiffs, it is alleged that "[i]t is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools". It is also alleged that the Act "constitutes compulsory taxation for the support of religion or religious educational institutions."

With respect to the latter allegation, as we have decided that the Education Act in purpose and primary effect does not advance or support religion, such taxation, assuming arguendo that it is compulsory, is not for the support of religion. Consequently, this allegation must fall. With respect to the former allegation, it is the purpose of the free exercise clause of the First Amendment "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority". *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). There is no allegation in the plaintiffs' complaint as to what their particular religious beliefs are nor how the Education Act, by authorizing the purchase of secular educational services, coerces them in the practice of their religion. In dismissing the free-exercise allegation in *Board of Education v. Allen, supra*, the Supreme Court stated:

> Appellants also contend that '§ 701 offends the Free Exercise Clause of the First Amendment. However, it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion' Abington School District v. Schempp, 374 U.S. 203, 223 . . . and appellants have not contended that the law in any way coerces them as individuals in thet practice of their religion. 392 U.S. at 248.

Since these essential allegations are also lacking in this case plaintiffs have failed to state a claim under the free-exercise clause of the First Amendment and, therefore, their complaint will be dismissed. In view of our disposition of defendants' motions to dismiss, we need not consider the remaining motions.

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

ORDER.

AND NOW, this 28th day of November, 1969, IT IS ORDERED that:

1. Defendants' motion to dismiss the complaint as to the organizational plaintiffs for lack of standing on all issues raised herein is GRANTED.

2. Defendants' motion to dismiss the complaint as to plaintiff Lemon for lack of standing under the religious clauses of the First Amendment is DENIED.

3. Defendants' motion to dismiss the complaint as to the remaining individual plaintiffs, Priscilla Reardon and Betty J. Worrell, for lack of standing as taxpayers under the establishment clause is GRANTED.

4. Defendants' motion to dismiss the complaint as to individual plaintiffs Reardon and Worrell for lack of standing under the free-exercise clause is DENIED.

5. Defendants' motion to dismiss the complaint as to all individual plaintiffs for lack of standing under the equal protection clause is GRANTED.

6. Defendants' motion to dismiss the complaint for failure of all plaintiffs to state a claim upon which relief can be granted is GRANTED.

BY THE COURT,

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

APPENDIX A.

§ *5601. Short title.*

This act shall be known and may be cited as the "Nonpublic Elementary and Secondary Education Act."
1968, June 19, P. L. —, No. 109, § 1.

Title of Act:

An act to promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; creating a Nonpublic Elementary and Secondary Education Fund to finance the purchase of secular educational services from nonpublic schools located within the Commonwealth of Pennsylvania for the benefit of residents of the Commonwealth of Pennsylvania; authorizing the Superintendent of Public Instruction to enter into contracts to carry out the intent and purposes of this act, and to establish such rules and regulations as are necessary; providing for the payment of administrative costs incident to the operation of the act; providing procedures for reimbursement in payment for the rendering of secular educational service; and designating a portion of revenues of the State Harness Racing Fund and of the State Horse Racing Fund as the sources of funds. 1968, June 19, P.L. —, No. 109.

§ *5602. Legislative finding; declaration of policy.*

It is hereby determined and declared as a matter of legislative finding—

(1) That a crisis in elementary and secondary education exists in the Nation and in the Commonwealth involving (i) the new recognition of our intellectual and cultural resources as prime national assets and of the national imperative now to spur the maximum educational development of every young American's capacity; (ii) rapidly increasing

costs occasioned by the rise in school population, consequent demands for more teachers and facilities, new but costly demands, in the endeavor for excellence, upon education generally; the general impact of inflation upon the economy; and the struggle of the Commonwealth, commonly with many other states, to find sources by which to finance education, while also attempting to bear the mounting financial burden of the many other areas of modern State governmental responsibility;

(2) That nonpublic education in the Commonwealth today, as during past recent decades, bears the burden of educating more than twenty percent of all elementary and secondary school pupils in Pennsylvania; that the requirements of the compulsory school attendance laws of the Commonwealth are fulfilled through nonpublic education;

(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education;

(4) That freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;

(5) That the Commonwealth has the right and freedom, in the fulfillment of its duties, to enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian;

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children

to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

1968, June 19, P. L. —, No. 109, § 2.

§ *5603. Definitions.*

The following terms whenever used or referred to in this act shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(1) "Nonpublic Elementary and Secondary Education Fund" shall mean the fund created by this act.

(2) "Secular educational service" shall mean the providing of instruction in a secular subject.

(3) "Secular subject" shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect.

(4) "Nonpublic school" shall mean any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law.

(5) "Purchase secular educational service" shall mean the purchase by the Superintendent of Public Instruction from a nonpublic school, pursuant to contract, of secular educational service at the reasonable cost thereof.

(6) "Reasonable cost" shall mean the actual cost to a nonpublic school of providing a secular educational service and shall be deemed to include solely the cost pertaining thereto of teachers' salaries, textbooks and instructional materials.

1968, June 19, P. L. —, No. 109, § 3.

§ 5604. *Nonpublic Elementary and Secondary Education Fund.*

There is hereby created for the special purpose of this act a Nonpublic Elementary and Secondary Education Fund dedicated to the particular use of purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science, and physical education, provided, however, that as a condition for payment by the Superintendent of Public Instruction for secular educational service rendered hereunder, the Superintendent of Public Instruction shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification approved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition.

1968, June 19, P. L. —, No. 109, § 4.

§ *5605. Administration.*

The administration of this act shall be under the direction of the Superintendent of Public Instruction, who shall establish rules and regulations pertaining thereto, make contracts of every name and number, and execute all instruments necessary or convenient for the purchase of secular educational service hereunder. All expenses incurred in connection with the administration of this act shall be paid solely out of the Nonpublic Elementary and Secondary Education Fund and no money used for the support of the public schools of the Commonwealth shall be used in connection with the administration of this act.

1968, June 19, P. L. —, No. 109, § 5.

§ *5606. Moneys for Fund.*

(a) Permanent Moneys. Into the Nonpublic Elementary and Secondary Education Fund shall be paid each year:

(1) All proceeds from horse racing up to the first ten million dollars ($10,000,000) realized by the State Horse Racing Fund established by the act of December 11, 1967 (Act No. 331),[1] remaining after, and not required for, payment of all of the items of administrative cost set forth in subsection (b) of section 18 of that act,[2] plus

(2) One-half of all such horse racing proceeds in excess of the sum of ten million dollars ($10,000,000), the remaining half thereof to be paid into the General Fund.

(b) Temporary Moneys. Until the time that proceeds in the amount of ten million dollars ($10,000,000) shall, in a given fiscal year, have been paid into the Nonpublic Ele-

1. 15 P. S. § 2651 et seq.
2. 15 P. S. § 2668.

mentary and Secondary Education Fund as provided for under subsection (a) of section 6 hereof,[3] three-fourths of the proceeds from harness racing realized by the State Harness Racing Fund established by the act of December 22, 1959 (P. L. 1978), as amended,[4] remaining after and not required for, the payments provided for in subsections (b) and (d) of section 16 of that act,[5] shall be paid into the Nonpublic Elementary and Secondary Education Fund according to the following formula:

(1) The entire three-fourths of the harness racing proceeds for any fiscal year shall be paid into the Nonpublic Elementary and Secondary Education Fund until such year as the horse racing proceeds designated by this section for the said fund are of such amount that, combined with the harness racing proceeds, the sum of ten million dollars ($10,000,000) shall have been realized by the Nonpublic Elementary and Secondary Education Fund.

(2) Proceeds from harness racing shall cease to be paid into the Nonpublic Elementary and Secondary Education Fund for any fiscal year in which proceeds from horse racing, designated by this section for the Nonpublic Elementary and Secondary Education Fund, shall equal ten million dollars ($10,000,000).

Moneys in the Nonpublic Elementary and Secondary Education Fund are hereby appropriated to the Department of Public Instruction to be used by the Superintendent of Public Instruction solely for the purchase of secular educational service hereunder and administrative expenses pertaining thereto as provided for in section 5 of this act.[6]

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3. This section.
4. 15 P. S. § 2601 et seq.
5. 15 P. S. § 2616.
6. Section 5605 of this title.

§ *5607. Reimbursement Procedures.*

(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered.

(b) Reimbursements for any fiscal year for the purchase of secular educational service hereunder shall not exceed the total amount of the moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund in that fiscal year.

(c) In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund shall be insufficient to pay the total amount of validated requests hereunder in reimbursement for that year, reimbursements shall be made in that proportion which the total amount of such requests bears to the total amount of moneys in the Nonpublic Elementary and Secondary Education Fund.

(d) The Budget Secretary shall, by July fifteenth of each year, certify to the Superintendent of Public Instruc-

tion, the total amount of money in the Nonpublic Elementary and Secondary Education Fund.

1968, June 19, P. L. —, No. 109, § 7.

§ 5608. *Effective Date.*

This act shall take effect July 1, 1968.

1968, June 19, P. L. —, No. 109, § 8.

§ 5609. *Severability.*

If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or [1] more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

1968, June 19, P. L. —, No. 109, § 9.

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1. Enrolled bill reads "of".

HASTIE, *Chief Circuit Judge*, dissenting.

The basic question we have to decide is whether the Pennsylvania Nonpublic Elementary and Secondary Education Act, No. 109 of June 19, 1968, 24 P.S. § 5601, on its face and construed in the light of certain factual allegations of the present complaint which must be deemed correct on motion to dismiss the complaint, violates the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment.

The Act provides that the state shall pay public funds to applying "nonpublic" elementary and secondary schools to reimburse them for having rendered "secular educational service" through the teaching of certain subjects; namely, mathematics, modern foreign languages, physical science and physical education. Reimbursement to a school is authorized only for the cost of teachers' salaries, textbooks and instructional materials after and to the extent that such costs have actually been incurred by the institution.

The complaint alleges that the great majority of the schools eligible for subsidies under the Act are affiliated with or under the control or direction of churches or are in other respects sectarian schools or schools which teach religion and that the primary purpose as well as the principal effect of the Act is thus to aid religious institutions. For purposes of the present motion the majority opinion properly accepts as factually correct the complaint's allegations as to the religious and sectarian character of most of the schools intended to receive and actually receiving state grants in aid under the Act. However, that opinion characterizes as an allegation of law, and therefore refuse to accept as correct, the allegation that the primary purpose and principal effect of the Act is thus to aid institutions of religion. Instead, the majority seems to view the question of the purpose and effect of the statute as foreclosed by

declarations in the statute itself that the legislative purpose is "to promote the welfare of the people of the Commonwealth" and "to promote the secular education of children attending nonpublic schools". With this I cannot agree.[1] But even if inquiry as to purpose and effect should be confined to examination of the language and scheme of the statute, I cannot avoid the conclusion that the primary purpose and effect of the enactment is to help the nonpublic schools by supplying them with needed financial aid, while whatever promotion of the public welfare is anticipated as a result of such public assistance is at best an incidental consequence claimed in justification of the state's action.

It merits mention at this point that both the statutory text and the majority opinion make much of the concept that the state "contracts to purchase secular educational services". Actually, this phrase is not descriptive of the statutory scheme. A nonpublic school that desires financial aid under the Act need do no more than submit, on a form prescribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called "contract". The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure in asking for aid and later proving that it has made expenditures that are reimbursable under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none. The artificial characterization of this

1. This is not a disposition on summary judgment where the factual posture of the case is established by affidavits and exhibits. Here decision is controlled by the allegations of the complaint and our judgment as to the potentiality of proof thereunder.

procedure as "contracting for secular educational services" does not help solve our constitutional problem.

Certainly the Establishment Clause of the First Amendment does not preclude the state from providing any assistance, no matter how indirect, to religious institutions. As the majority opinion correctly indicates, religion's interest and the state's interest in the public good necessarily overlap. In contemporary experience churches and other religious institutions characteristically, and to their great credit, conceive their mission and undertake their ministry through various social means additional to the fundament of worship. The providing of shelter and care for the needy and aged, education for youth, and other social services for the community are all deemed an important part of organized church work. Yet, in the modern welfare state, similar activities have long since won recognition as important governmental functions and responsibilities, from the performance and discharge of which religious institutions with like undertakings may derive incidental benefits. Thus, where the state has supplied all school children with transportation and books, sectarian educational enterprises are indirectly aided by being relieved of a financial burden which they might otherwise feel obligated to bear. In *Everson v. Board of Education,* 1947, 330 U.S. 1, and *Board of Education v. Allen,* 1968, 392 U.S. 236, the Supreme Court recognized that the Constitution does not preclude a state from thus providing public services directly to its people merely because such services incidently aid religious institutions. However, these cases do not suggest that the Constitution permits direct public financing of a religious enterprise merely because such aid also benefits the state.

It is unrealistic to view the present statute as merely subsidizing secular instruction and thus only incidentally benefiting religious institutions by releasing their funds for religious purposes. The primary purpose for which sec-

tarian schools formulate and offer a comprehensive curriculum apart from the public school system is religious. Through a total educational program offered in a separate religious environment, sectarian schools serve to inculcate and reinforce in children doctrine and moral precepts derived from the tenets of the church. It is not necessary to inquire whether, for the fulfillment of this primary religious purpose every course is taught with religious overtones. The crucial consideration is that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives. When the state reimburses a sectarian school for any part of the curricular costs of such a teaching program it directly finances and supports a religious enterprise. Constitutionally, such subsidizing of a religious enterprise is not essentially different from a payment of public funds into the treasury of a church. Such a prohibited involvement of the state in a religious undertaking is not validated merely because the religious enterprise itself incidentally relieves the state of the cost of educating many children.

Even more important than the foregoing analytical distinction are the constitutionally significant consequential distinctions between the present statute and those considered in the *Everson* and *Allen* cases. The statute in this case, much more than those in *Everson* and *Allen*, invites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions.

It has already been pointed out that sectarian schools are only part of the complex of activities, many of them as "secular" as the teaching of languages and physical science, which modern churches and religious institutions finance and conduct. Charities, hospitals, community centers and homes for the aged and infirm are familiar examples. The theory that would validate Act No. 109 also

unavoidably validates state subsidies for all such enterprises of religious organizations, as well as subsidies for all of the "secular" parts of sectarian education not included in the present statute. If the Constitutional bar to state grants in all such cases should be removed, it is reasonable to anticipate continuing political controversy in every state and local community whether and to what extent public funds are to be granted to subsidize a large number and a broad range of activities of religious organizations. Leaders and devout members of various organized religious groups will see it as their duty to their church or sect to seek such aid and to insist that state and local government contribute liberally to their sectarian enterprises. Legislators, government executives and candidates for elective office in whose judgment other claims upon the public purse merit higher priority can anticipate political opposition as enemies of the faith. In this way religion and politics will become *in pari materia*.

So far we have escaped much of the diviseness and antagonism of political differences and controversies about religious matters because public financing of activities of religious organizations has been understood to be prohibited by our Constitution. Professor Paul Freund has perceptively pointed out that President Kennedy was able to avoid taking a political position upon issues of religious character by relying upon authoritative decisions on the Constitutional separation of state and religion as controlling. Freund, *Public Aid to Parochial Schools*, 1969, 82 HARV. L. REV. 1680, 1692. But if the present statute is held to be Constitutional, I see no escape from the evils that attend a widespread and pervasive intermingling of politics and religion.

The other side of the coin is the inevitability of state intrusion into the affairs of organized religion in the administration of the present statute. As already stated, it is

the justifying imperative of most, if not all, church sponsored and controlled education that formal education shall serve to inculcate and reinforce in youthful minds sectarian doctrine and moral precepts derived from the tenets of the church.[2] In schools with such a mission it is appropriate, practically unavoidable, that admission policies and practices reflect a preference for enrollment of children of the sponsoring faith, though not necessarily excluding all others. Yet, once the state joins in financing such education, the mandated equalitarian position of the state must result in state imposition of strictly non-discriminatory admission standards consistent with public duty,[3] whatever sacrifice of appropriate religious objectives may result. I cannot square such state intrusion into religious affairs with the concept of separation of church and state which the First Amendment implements.

The same is true in the matter of curriculum. If the state is to finance "secular" teaching in parochial and other church related schools, the state must have the power and responsibility of monitoring curriculum and instruction to assure that teaching in these state supported areas is not so oriented as to inculcate sectarian or religious tenets or doctrines. Indeed, Act No. 109 expressly provides for state

2. See L. Pfeffer, Church, State, and Freedom, 1953, 290-300; See also Rev. S. Woywood, The New Canon Law, under imprimatur of Most Rev. Francis Spellman, Archbishop of New York, and others (1940), quoted in *Everson v. Board of Education*, 330 U.S. 1, 18, 22-23 (Jackson, J., dissenting).

3. *Cf.* Evans v. Newton, 1966, 382 U.S. 296; *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715; *Cooper v. Aaron*, 1958, 358 U.S. 1, 16-19; *Pennsylvania v. Board of Directors of City Trusts*, 1957, 353 U.S. 230; *Kerr v. Enoch Pratt Free Library*, 4th Cir. 1945, 149 F.2d 212.

It is difficult to see how the provision of the Pennsylvania Fair Educational Opportunities Act that sanctions religious discrimination in admission policies and practices of sectarian schools could validly be applied to sectarian schools that receive public financing under Act No. 109. 24 P.S. § 5004(c).

approval of text books and teaching materials in all subsidized schools. The substantiality of this involvement is indicated by Mr. Justice Douglas in the course of his dissent in *Board of Education v. Allen,* 392 U.S. 236, 258-62, where he elaborates numbers of instructive examples of sectarian orientation in teaching materials appropriately used in the teaching of "secular" subjects in church related schools. The extent to which religious orientation of secular subjects will become an appropriate subject of state inquiry is also suggested by interrogatories which the plaintiffs in this suit have addressed to the defendant schools. For example, the church related schools have been asked to disclose the extent to which sectarian precepts are involved in the teaching of secular subjects; whether teachers of such subjects are clerics, and what religious materials and symbols are used or displayed in the schools in connection with activities other than religious ceremonies. It is difficult to imagine a type of intrusion by the state more offensive to a religious community than such pervasive monitoring and investigation of instruction and academic organization in order to purge the secular areas of the curriculum of religious orientation. Yet, it is to just such intrusion that the Pennsylvania statute opens the door, if by necessary implication it does not go farther and mandate the entry of state overseers as the only means by which the state can adequately check upon the initial and continuing eligibility of particular "secular" instruction for state financing.[4]

Mr. Justice Goldberg, in *Abington v. Schemp,* 1963, 374 U.S. 203, 248 and Mr. Justice Harlan, in *Board of Education v. Allen,* 392 U.S. 236, 249, have both expressed what I believe to be a sound rationalization that the First Amend-

4. Act No. 109 explicitly restricts state aid to courses which "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect".

ment is violated by state action which will "involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude". I am unable to avoid the conclusion that the state undertaking authorized by Act No. 109 would thus intolerably involve the state in the realm of the sectarian.

It must also be considered that some of the schools eligible for aid under Act No. 109 appear to be non-sectarian private schools which do not include religious training in their educational programs. Obviously, the First Amendment does not debar state aid to such schools. However, the plaintiffs allege and seek to prove statistically that only a very small minority of the eligible schools are of this character and that this fact and the legislative history of the statute combine to show that the primary purpose and effect of the legislation is to aid sectarian schools. I think the plaintiffs should be permitted to show, if they can, that the inclusion of non-sectarian private schools as institutions eligible for state aid is so minor and incidental an aspect of the statutory scheme that it cannot validate the enactment.

It remains to consider the claim that subsidizing the defendant non public schools as authorized by the statute would deny the plaintiffs the equal protection of the laws. I agree with the majority that the organization plaintiffs lack standing to challenge the legislative scheme under either the First Amendment or the Equal Protection Clause. I also agree that no individual plaintiff alleges that any discrimination practiced by any of the defendant schools affects him or his children in a way that would give him standing to litigate the equal protection issue.

Finally, while I agree with the majority that plaintiff Lemon does and the other individual plaintiffs do not have standing to litigate the alleged violation of the Establish-

ment Clause on the basis of the requirements enunciated by the Supreme Court in *Flast v. Cohen*, 1967, 392 U.S. 83, my reasoning is somewhat different and leads to the conclusion that, except for Lemon, the individual plaintiffs lack standing under the Free Exercise Clause even more clearly than under the Establishment Clause.

In *Flast v. Cohen*, federal income taxpayers alleged that the expenditure of federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction in sectarian schools and to purchase educational materials for use in such schools violated the religion clauses of the First Amendment. The taxpayers' bill for a declaratory judgment and an injunction was dismissed by a three-judge district court for lack of standing. The Supreme Court reversed, holding that the plaintiffs had satisfied the requirements of a logical connection between their status as taxpayers and both "the type of legislative enactment attacked" and "the precise nature of the constitutional infringement alleged". 392 U.S. at 102. The Supreme Court relied principally on its finding that the Establishment Clause was designed to limit the taxing and spending powers of Congress and specifically declined to decide whether the taxpayers' free exercise claim alone would confer standing. 392 U.S. at 104 n. 25.

In this case, the ultimate source of funds for the challenged payments under Act No. 109, and the only source, is the admission tax on harness races, 15 P.S. § 2606 (1967), and on thoroughbred races, 15 P.S. § 2656 (Supp. 1969). Plaintiff Lemon alleges that he has paid an admission fee to a harness race, including the tax. All three individual plaintiffs allege that "[i]t is against [their] religious conscience to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools". The majority opinion apparently con-

strues the latter allegation to mean that, except for Lemon, the individual plaintiffs have refrained from attending the races because to do so would require them to support parochial education. However, the complaint contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues to the purposes of Act No. 109, and none of the individual plaintiffs has alleged any particular religious belief or any effect of Act No. 109 on the practice of a particular religion.

The individual plaintiffs other than Lemon can only be considered "taxpayers" within the scope of the standing requirements of *Flast v. Cohen*, if their "tax money is being extracted and spent in violation of specific constitutional protections. . . ." 392 U.S. at 106. The plaintiffs who have not attended horse races have not alleged that their "tax money is being extracted" by Act No. 109 unless by virtue of a theoretical increase in general tax requirements that might result from the failure to allocate racing revenues to general expenses. However, *Flast v. Cohen* pointed out that where a challenged tax operates "upon a particular class of taxpayers . . . the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class". 392 U.S. at 104 n. 25. Although the Supreme Court was referring to taxpayer standing under the Free Exercise Clause in the quoted dictum, the required nexus between taxpayer status and "the type of legislative enactment attacked", 392 U.S. at 102, also depends on actual or threatened liability for a tax in a challenge under the Establishment Clause. In order to have "the requisite personal stake in the outcome", 392 U.S. at 101, the plaintiffs should have an established monetary interest in the relief sought, rather than an interest that will be realized only if judicial action enjoining

expenditures supported by a particular tax program to which plaintiffs are not subject shall result in a decrease in general tax burdens. Therefore, the individual plaintiffs other than Lemon do not have taxpayer standing to challenge Act No. 109 under either of the religious clauses because they do not contribute revenues disbursed under the Act, and are not "taxpayers within the affected class".

On the other hand, such a taxpayer as plaintiff Lemon, who is subject to the tax program that supports the particular statutory scheme sought to be enjoined, "may or may not have the requisite personal stake in the outcome . . . ." 392 U.S. at 101. Focusing upon the nexus between Lemon's status as a taxpayer and "the precise nature of the constitutional infringement alleged", 392 U.S. at 102, Lemon does complain that he has been required to contribute in support of an establishment. Although Lemon was not compelled to attend a harness race, he has been constrained by the state government to pay a tax on his attendance, a tax that is specifically earmarked by statute for purposes that allegedly support an establishment of religion. In view of the primary function of the Establishment Clause in restraining taxation and disbursement in support of religion, the tax Lemon has paid possesses a sufficient connection to the challenged expenditures under Act No. 109 and to the alleged Constitutional infirmity of the Act to lend the requisite specificity and adverseness to his claim. Accordingly, I conclude that plaintiff Lemon has standing to attack the validity of the legislation under the Establishment Clause.

As to all plaintiffs I would dismiss so much of the claim as alleges a violation of the equal protection clause because of lack of standing to sue. However, in my view, the allegations of the complaint disclose a legislative scheme violative of the Establishment Clause of the First Amendment, as to which plaintiff Lemon alone shows standing to com-

plain. As to Lemon's First Amendment claim, the motion to dismiss should be denied.

WILLIAM H. HASTIE,

Chief Judge, Court of Appeals for the Third Circuit.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR UNITED AMERICANS FOR PUBLIC SCHOOLS AS AMICUS CURIAE

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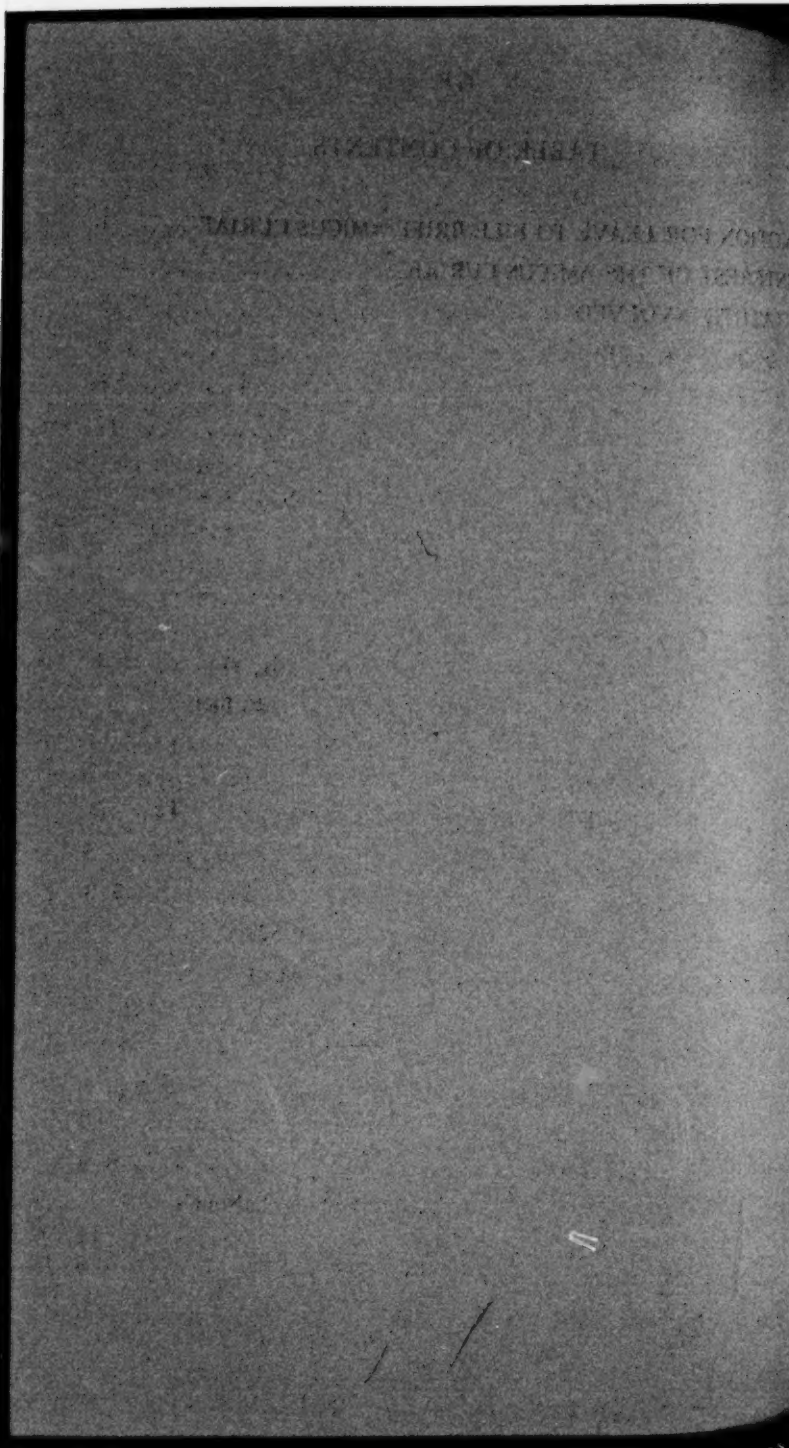

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1189

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee,

MOTION OF UNITED AMERICANS FOR PUBLIC SCHOOLS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF

United Americans for Public Schools, pursuant to Rules of this Court, respectfully applies to this Court for leave to file its annexed brief as an amicus curiae in support of Appellants in the above entitled action, on the following grounds:

1. Amicus Curiae has obtained consent of the Appellants but not of all the parties herein within the time prescribed for filing briefs for the reason that its counsel, resident in California, has not been able to review all the briefs on file to ascertain whether there is need for additional commentary. Having reviewed some of said briefs, it appears that there is such need, and that the points raised in the annexed brief will present additional points not yet raised and will be helpful to the Court. The special considerations will appear more fully herein.

2. The questions presented by the above-entitled action include those set forth in Appellants' Jurisdictional Statement, to which amicus refers and incorporates herein. In addition to said presented questions, amicus suggests the following:

In deciding whether the primary purpose and principle effect of the Act is to aid religious institutions, may the Court construe the Appellants' complaint so as to permit evidence or judicial notice that all teaching in church schools is permeated with religious instruction, including authoritative Roman Catholic Papal and Cannonical law pronouncements and related texts.

3. Interest of United Americans for Public Schools.

United Americans for Public Schools (formerly Californians for Public Schools) is a California non-profit corporation, formed in 1953 and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members and to the public related and objective educational facts and findings to preserve the purposes of public schools and of the said constitutions, and to foster adherence thereto and support thereof.

Its members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned, both personally and economically, in the issues of the instant case, because (1) of its concern generally with preserving the purposes of public schools and the Constitutional doctrine of separation of church and state aforesaid, (2) because the statute under attack but held valid below constitutes an outright subsidy to church schools of public funds, contrary to established principles of separation of church and state, (3) because the holding below unduly restricts the holding in *Flast v. Cohen*, 392 U.S. 83, wherein movant filed its amicus curiae brief on behalf of appellants who successfully prevailed in this Court and in a holding that plaintiffs, similar to those in the instant case, had standing to sue, (4) because the Court below misinterpreted *Board of Education v. Allen* so as to foreclose appellants from proving the sectarian nature of the teaching in recipient schools and (5) because the Court-approved device of using legislative findings to foreclose such proof will give to churches everywhere, including California, carte blanche to make inroads on public funds.

4. Reasons for submission of brief.

Movant has reason to believe that some vital questions of law, relevant to the issues herein, have not been fully covered therein. These include elaboration upon the misuse of *Board of Education v. Allen*, to prevent proof of the sectarian nature of teaching in church schools.

It is respectfully requested on the above grounds that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

UNITED AMERICANS FOR
PUBLIC SCHOOLS

By/s/ Henry C. Clausen
Attorney for Movant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1189

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

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Defendants-Appellees,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee,

BRIEF

INTEREST OF THE AMICUS CURIAE

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ence to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members and to the public related and objective and educational facts and findings to preserve the purposes of public schools and of the said constitutions, and to foster adherence thereto and support thereof.

Its members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned, both personally and economically, in the issues of the instant case, because (1) of its concern generally with preserving the purposes of public schools and the Constitutional doctrine of separation of church and state aforesaid, (2) because the statute under attack but held valid below constitutes an outright subsidy to church schools of public funds, contrary to established principles of separation of church and state, (3) because the holding below unduly restricts the holding in *Flast v. Cohen*, 392 U.S. 83, wherein movant filed its amicus curiae brief on behalf of appellants who successfully prevailed in this Court and in a holding that plaintiffs, similar to those in the instant case, had standing to sue, (4) because the Court below misinterpreted *Board of Education v. Allen* so as to foreclose appellants from proving the sectarian nature of the teaching in recipient schools and (5) because the Court-approved device of using legislative findings to foreclose such proof will give to churches everywhere, including California, carte blanche to make inroads on public funds.

STATUTE INVOLVED

The statutory provisions involved in this suit appear in Appendix A to Appellants' Jurisdictional Statement to which amicus refers and incorporates herein, known as the Pennsylvania "Non-public Elementary and Secondary Education Act."

QUESTION PRESENTED BY THIS BRIEF

In order to avoid redundancy in briefing, amicus poses the following additional single question:

In deciding whether the primary purpose and principal effect of the act is to aid religious institutions, may the Court construe the Appellants' complaint so as to permit evidence or judicial notice that all teaching in church schools is permeated with religious instruction, including authoritative Roman Catholic Papal and Cannonical law pronouncements and related texts.

STATEMENT OF THE CASE

Reference is made to the foregoing motion and to Appellants' Statement.

I. PLAINTIFFS SHOULD HAVE BEEN PERMITTED TO PROVE THE ALLEGATIONS OF THEIR COMPLAINT THAT THE PRIMARY PURPOSE AND PRINCIPAL EFFECT OF THE ACT IS TO AID RELIGIOUS INSTITUTIONS, INCLUDING PROOF THAT CHURCH SCHOOLS IN GENERAL AND THE RECIPIENT ROMAN CATHOLIC CHURCH SCHOOLS IN PARTICULAR, COMPRISING NINETY PER CENT OF THE TOTAL NON-PUBLIC SCHOOLS AIDED, PERMEATE ALL SUBJECTS, ALL SECULAR OR SECTARIAN TEACHINGS, AND ALL PHASES OF ATTENDANCE AND SURROUNDINGS, WITH RELIGIOUS INSTRUCTION.

References to plaintiffs' complaint are set forth in its Jurisdictional Statement to this Court, including pages 4, 5, 9, 11, 15, 16, 18, and 19, and sufficiently form a base for such proof.

Board of Education v. Allen 392 U.S. 236, does not hold what the Court below says it holds. Rather, it confirms that the Court below erred in failing to permit proof, either by judicial notice or by introduction of evidence, of the sectarian nature of all teaching in parochial schools. The Court

below erroneously construed the *Allen* case as holding that all teaching in a sectarian school may not be religious and that the processes of secular textbooks are in fact instrumental in the teaching of religion. The Court in the *Allen* case did not so hold. Instead, it held on an appeal from a summary judgment that the meager record failed to support the proposition advanced. It pointed out that no evidence had been offered as to particular schools, particular courses, particular teachers or particular textbooks. Our case is the converse. Such evidence was offered, was available, was judicially noticable, all in support of specific allegations of the complaints, and the Court below erroneously refused to permit such introduction.

II. THE COURT MAY JUDICIALLY NOTICE THE PERMEATION PROOF.

It is within the power of the Court to consider and consult standard works of authority and usage of the customs and ecclesiastical law which govern religious denominations. The object and justification of such resort to printed books is the aid which the Court may expect in the exercise of the faculty of judicial notice.

31 C.J.S. 835
Dyer v. Superior Court 94 Cal. App.
260 p. 268

The Judge is free to consult on his own motion any sources he considers reliable and proper, including essays, magazines articles and brochures.

Brown v. Piper 91 U.S. 37, 42
Dwinell-Wright Co. v. National Fruit Products Co. 140 Fed. 2d 618-624
Greeson v. Imperial Irrigation District 59 Fed. 2d 529
Friend v. Burnham and Morrill Co. Fed. 2d 150

National Surety Corporation v. First National Bank of Indiana 106 Fed. Sup. 302
9 Wigmore, Evidence §2568a

A Court may take judicial notice of the facts in "standard works accessible in any considerable library".

Weck v. Parker 249 U.S. 130
DeCew v. Union Bag and Paper Corporation 59 Fed. Sup. 301, 313
Friend v. Burnham and Morrill Co., supra

III. THE FACTS WHICH THE COURT SHOULD HAVE PERMITTED TO BE SO ADDUCED OR JUDICIALLY NOTICED INCLUDE THE FOLLOWING:

Roman Catholic Papal Edicts and law require (1) that Roman Catholic parents send their children to its church schools, (2) that *all* subjects must be diffused and permeated with religious instruction and (3) that demands be made for public tax funds. The American church officials are merely executing and voicing these directives from Rome. Control is in Rome, regardless of the American hierarchy, on subjects such as birth control, dogma or education.

Roman Catholic Cannon Law provides:

> "Catholic children shall not attend non-Catholic, neutral, or mixed schools, namely, those which are open also to non-Catholics." (Cannon 1374)

The Encyclical of Pope Pius XI, (Five Great Encyclicals, The Paulist Press) reads:

> "We renew and confirm their declarations, as well as the Sacred Canons in which the frequenting of non-Catholic schools, whether neutral or mixed, those namely which are open to Catholics and non-Catholics alike, is forbidden for Catholic children, and can

be at most tolerated, on the approval of the Ordinary alone, under determined circumstances of place and time and with special precautions." (Page 60)

and further:

"*It is necessary that all the teaching and the whole organization of the school, and its teachers, syllabus and textbooks in every branch, be regulated by the Christian spirit, under the direction and maternal supervision of the Church*; so that religion may be in very truth the foundation and crown of the youth's entire training; and this in every grade of school, not only the elementary, but the intermediate and the higher institutions of learning as well. To use the words of Leo XIII: 'It is necessary not only that religious instruction be given to the young at certain fixed times, *but also that every other subject taught, be permeated with Christian piety*." (Page 60) (Emphasis added)

Recent official interpretive books confirm this as the present Roman Catholic position. See "Catholic Viewpoint on Education" (by Neil G. McCluskey, S.J., Doubleday).

"Despite the fact that *religion* is taught formally for only brief periods, its *influence pervades other areas of the curriculum*. Religious themes receive proportionate treatment in other courses where they are integral to the subject. *This will occur particularly in literature, history, and social studies.*" (Page 74) (Emphasis added)

"These principles are not taught day by day by means of blackboard diagrams and class recitations. In a gentle imperceptible manner, however, their meaning is absorbed and they become quietly operative in the life of the Catholic child. Certain traditional religi-

> ous symbols silently telling of God, the Incarnation of His Son, man's Redemption by Christ, and the life of the blessed in heaven help to establish this atmosphere of the supernatural. The cross above the school building, the crucifix hanging in every classroom, and other religious symbols that adorn the walls serve constantly to remind the pupils of things that transcend this world. Even the clerical garb of the priest and the religious robes of the Sisters and Brothers–symbolizing dedication to the loftiest values of the spirit–contribute to this effect. (Page 78)
>
> "*The function of the Catholic school is not merely to teach the formulas of the Catholic religion but, as Father George Bull of Fordham University once said, 'to impart in a thousand ways, which defy formularization, the Catholic attitude toward life as a whole.'*" (Page 78) (Emphasis added)

And see "Catholic Schools in Action", (University of Notre Dame Press–1966):

> "Every Catholic school teaches religion, although it may by no means do so in the way others do. In all, symbols associated with the liturgy and prayer are intimately associated with the school day. The very presence of the religious is in itself a dominant, unforgettable symbol. Here are persons set apart from the world reminding that world not merely of sin, of justice, and of judgment, but also of the unavoidable choice between the holy and the unholy, between the things that are of time and the things that transcend time. One may rebel against all this, as many have, but even those who do not surrender to the school cannot erase its imprint from the texture of their minds. This one remembers about Catholic education when virtually all else may have been forgotten." (Page 17)

The extent to which the curriculum of church schools in general is permeated with denominationally slanted material has been scientifically demonstrated. Dr. George R. LaNoue made a study of more than 100 Roman Catholic and other church school textbooks. LaNoue's findings, summarized in the June 1962 issue of the *Phi Delta Kappan*, are as follows:

> "1. Religious symbols and subjects are commonly used in mathematics and language arts texts;
>
> "2. Specific sectarian doctrines are presented where controversial matter appears in science, geography, and language texts;
>
> "3. All subjects are presented with a general Christian theistic approach;
>
> "4. Texts in some subjects request that pupils concern themselves with specific church goals, such as working and praying that non-Western cultures will adopt Christianity or playing one's part in spreading the gospel message;
>
> "5. Appeals are made to church authority to prove points in many subject areas;
>
> "6. Selective emphasis is placed on denominational institutions and contributions to culture and on facts favorable to the particular church, while contributions to culture by other churches and facts unfavorable to the particular church are omitted;
>
> "7. Texts in a number of subjects defend denominational social ideas and regulations."

Hence, what Mr. Justice Jackson of the U.S. Supreme Court said in the Everson opinion, 330 U.S. 1, is true today:

> ". . . The parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice that venerable institution, I should expect, would

> forego its whole service for mature persons before it would give up the education of the young . . . Catholic education is a rock upon which the whole structure rests and to render tax aid to a church school is indistinguishable to me from rendering the same aid to the church itself."

CONCLUSION

The Supreme Court should vacate the Order dismissing the Complaint and either (a) remand with a direction to proceed with discovery and trial on both First and Fourteenth Amendment issues or (b) take judicial notice of the official Committee proceedings, transcripts, reports and journals of the House and Senate of Pennsylvania, and of the regulations and application forms promulgated by the Superintendent of Public Instruction, and of the fact that all teaching in church schools is permeated with religious instruction, and declare the Act unconstitutional on its face as violative of the First Amendment.

Respectively submitted,

/s/ Henry C. Clausen

June 1, 1970

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Supreme Court of the United States
FILED
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JOHN F. DAVIS, CLERK

October Term, 1969

No. [redacted]-89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

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Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL COUNCIL OF JEWISH WOMEN AND UNION OF AEMERICAN HEBREW CONGREGATIONS, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1189

ALTON J. LEMON, *et al.*,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, *et al.*,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

The statute under attack is Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, 24 P.S. (Purdon, Supp. 1969) §5601, *et seq.* (referred to herein as "the Act"). The scheme of the Act is that, from funds derived from a tax on flat and harness racing, the Superintendent of Public Instruction of the Commonwealth of Pennsylvania is authorized to cause the Treasurer of the Commonwealth to reimburse nonpublic schools by cash or draft, for the cost to those schools of teachers' salaries, textbooks, and teaching materials in the fields of mathematics, modern foreign languages, physical sciences, and physical education for the preceding year.

Over $5 million is now being paid by the Commonwealth of Pennsylvania in installments, which commenced with the first payment in September, 1969, for reimbursement for costs incurred by the nonpublic schools for the preceding academic year, 1968-69. Appellants' complaint, which requested a three-judge court, sought a preliminary and final injunction restraining the appropriate officials of the Commonwealth from making any payments under the Act to the seven church-affiliated schools named as defendants, which were alleged to be typical of virtually all the schools receiving aid. Of the pupils in the private schools of Pennsylvania, 96.6 per cent attend church-affiliated schools.[1] The complaint alleged that the statute, on its face and as

1. *Statistics on Nonpublic Elementary and Secondary Schools, 1965-1966*, Office of Education, U. S. Dept. of Health, Education and Welfare, OI-20111.

applied, authorizes payment to sectarian educational institutions controlled by churches, having as their purpose the teaching and propagation of a particular religious faith in conducting their operations, curricula, and programs to fulfill that purpose; and further alleged that the overwhelming proportion of the recipient schools are attended overwhelmingly by white students. With respect to the fact that these schools are the organs and instrumentalities of churches and religious groups, the complaint alleged that the statute violates both the Establishment and Free Exercise Clauses of the First Amendment and that, insofar as the Act authorizes the payment of funds to racially segregated schools, it violates the Equal Protection Clause of the Fourteenth Amendment.

With respect to the violation of the clauses on religion in the First Amendment, the complaint made certain specific allegations of fact. It alleged a violation of the Establishment Clause in that the Act provides for direct financial aid out of state funds to sectarian schools, that it finances and participates in the blending of sectarian and secular instruction, and that it has as its purpose and primary effect the advancement of religion. The Free Exercise Clause was alleged to be violated by reason of the fact that the statute constitutes taxation for the support of religion.

The complaint was filed on June 3, 1969, together with a Motion for Preliminary Injunction and an Order for the appointment of a three-judge court. On July 7, 1969, appellants filed interrogatories and a Motion to Produce under Fed. R. Civ. P. 34 upon defendant schools. All dis-

covery was subsequently stayed pending disposition of several motions by defendants below, including motions to dismiss the complaint for failure to state a claim and for lack of standing. On November 28, 1969, after briefs and argument, the District Court dismissed the complaint, Chief Judge Hastie dissenting. The majority held that some of the plaintiffs lacked standing to complain about violation of the religion clauses of the First Amendment and that the remaining plaintiffs, while having such standing, had failed to state a cause of action. Insofar as the complaint charged a violation of the Equal Protection Clause, the court held that all plaintiffs lacked standing to raise this issue.

Interest of the *Amici*

This brief is submitted in behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress
Anti-Defamation League of B'nai B'rith
Conference of American Rabbis
National Council of Jewish Women
Union of American Hebrew Congregations

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that

the program provided for in the statute under review is a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

In addition, these organizations, which have consistently fought for equal opportunities for all, regardless of race, color, creed or national origin, and which have always opposed racial segregation in schools, believe that grants of public funds to private schools as authorized by the Act will further stimulate the trend toward racial segregation in the schools of Pennsylvania, with private schools attended almost exclusively by white pupils and the public schools attended by most of the nonwhite children. The *amici* view this effect of the Act as a violation of the Equal Protection Clause of the Fourteenth Amendment.

The Questions to Which This Brief Is Addressed

This brief *amici curiae* is addressed to the following questions:

1. Does the Act violate the Establishment Clause of the First Amendment because it provides state support for the propagation of religion?

2. Does the Act violate the Establishment and Freedom of Religion Clauses of the First Amendment because it permits an improper commingling of church and state?

3. Does the Act, insofar as it authorizes the payment of public funds to private schools which are racially segre-

gated, violate the Equal Protection Clause of the Fourteenth Amendment?

4. Do the plaintiffs or any of them have standing to raise the question as to Equal Protection?

Summary of Argument

I. The Act violates the Establishment Clause of the First Amendment because it provides state support for the propagation of religion.

A. The Act permits the financing of schools which weave sectarian teaching into the instruction of secular subjects. On the allegations of the complaint in this case, such interweaving does occur in at least some of the schools covered by the Act.

B. Even if the instruction financed by the Act is purely secular, the Act assists church-controlled schools by relieving them of financial burdens they would otherwise have to carry. It thereby has the effect of advancing the religious instruction which is the principal purpose of these schools.

II. Government financing of secular instruction in religiously affiliated schools results in a commingling of church and state in a manner prohibited by the Establishment and Freedom of Religion Clauses of the First Amendment. It necessarily requires state supervision of the financed operations. In particular, it involves the state in day-to-day determinations of whether secular instruction is being given in the sectarian schools in a sectarian manner. This necessarily subjects the state to conflicting pressure from various

religious and nonreligious groups not only as to the manner in which the responsibility of supervision is performed but also as to the choice of officials to be charged with that responsibility.

III. The Act also violates the Equal Protection Clause of the Fourteenth Amendment in perpetuating racial segregation in the education system of Pennsylvania. As statistics show, education in Pennsylvania is largely segregated in that private schools are mostly white while most of the Negro children attend public schools. By supporting private schools, the Act aggravates this segregation. Since this support constitutes state action, it falls squarely within the prohibition of the Equal Protection Clause of the Fourteenth Amendment.

IV. The plaintiffs have standing to raise the question of equal protection. At least one of them is the father of a child attending a public school and thus is directly affected by the aggravation of racial segregation resulting from the Act.

ARGUMENT

POINT I

The Act violates the Establishment Clause of the First Amendment because it provides state support for the propagation of religion.

The precise meaning of the Freedom of Religion and No-Establishment Clauses of the First Amendment, like other broad constitutional guarantees, has always been and probably always will be subject to dispute. Until recently, however, it has been accepted almost without question, by

state legislatures as well as by Congress, that constitutional doctrine bars the direct transfer of tax-raised funds to institutions established for the propagation of religion. It was that assumption that was expressed by this Court in its classic statement in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947), since repeatedly reaffirmed (most recently in *Board of Education* v. *Allen*, 392 U. S. 236, 242 (1968)), that:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

As this Court said in *Walz* v. *Tax Commission of the City of New York*, 90 S. Ct. 1409, 1411 (1970):

> It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the "establishment" of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.

During the past 50 years, a few practices that were challenged by some as violating that concept—such as free busing and the lending of textbooks—have been accepted in some states. But not until very recently has it been seriously contended that taxpayers could be compelled to contribute to massive financing of church-related schools, and ultimately to the financing of all aspects of such schools except specifically religious instruction.

We submit that the separation principle clearly bars such financing and that this case provides an opportunity for this Court to make that clear.

In *Abington School District* v. *Schempp*, 374 U. S. 203, 222 (1963), this Court stated the following test for deter-

mining whether action by a state violates the Establishment Clause:

> • • • what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

This test was applied by this Court in *Board of Education* v. *Allen, supra,* in upholding the lending of state-owned textbooks for use in religiously affiliated schools. It seems also to have been applied, although without specific reference, in *Walz* v. *Tax Commission of the City of New York, supra,* upholding tax exemption for churches.

Despite efforts to treat this "purpose and effect" test as a replacement of the interpretation of the Establishment Clause in *Everson,* it remains true that, as this Court reiterated in *Allen* (392 U. S. at 242), the Clause bars any "tax in any amount, large or small • • • levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We submit that this prohibition is violated by the transfer of state funds for the support of a religious school, regardless of what aspect of the school's operations is to be financed. We submit further that such a transfer doubly violates the test laid down in the *Schempp* case in that it has both the purpose and the effect of aiding religion. (As we show in Point II below, it also violates the "commingling" test suggested in *Walz.*)

A. The Act Finances the Sectarian Teaching of Secular Subjects.

1. It is standard practice in at least some nonpublic schools to teach religion with secular subjects.

Only recently, in its decision in *Walz, supra,* this Court referred to the efforts of particular religions "to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age" and observed (90 S.Ct. at 1412-13) that

> No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools.

For the Catholic Church, in particular, parochial schools are viewed as an instrumentality for the propagation of religion through all aspects of their day-to-day operations.[2] The authority for this view was described by Justice Jackson in his dissenting opinion in *Everson, supra,* 330 U. S. at 22-24. The Catholic parochial school system is predicated on the sections of the Canon Law there quoted by Justice Jackson. The encyclical of Pope Pius XI *On the Christian Education of Youth* states that the "only school approved by the Church is one where * * * the Catholic religion permeates the entire atmosphere [and where] all teaching and the whole organization of the school and its teachers, syllabus and textbooks in every branch [is] by the Christian spirit."[3]

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2. Because the court below dismissed the complaint without a hearing on controverted questions of fact, appellants had no opportunity to prove the sectarian nature of instruction in the subjects and schools affected by the Act. As we show below (pp. 14-17), it must therefore be assumed that at least some financing of sectarian instructions is permitted by the Act.

3. Redden and Ryan, A Catholic Philosophy of Education, 107, 118 (1942).

These words of the Pope epitomize the whole Catholic philosophy of education and the educational foundation of the Catholic parochial school system. Catholic doctrine does not conceive of religion as a subject which, like history or music, can be taught more or less independently of other subjects a specified number of school hours weekly; in the Catholic school, religion is not merely a branch in the curriculum, nor is it confined to mere instruction. The ultimate goal of education is the praise, reverence and service of God; and everything else in education must be subordinated and directed toward this ultimate end.[4] This leaves no place for purely secular instruction in the Catholic school; indeed, the term "secular education" is almost self-contradictory in such schools. Everything taught in the Catholic school is taught with the ultimate goal of religious education in mind—everything must be impregnated with God and religion. As stated by the Reverend Joseph H. Fichter, S.J., in an authoritative book published in 1958:

> It is a commonplace observation that in the parochial school religion permeates the whole curriculum and is not confined to a single half hour period of the day. Even arithmetic can be used as an instrument of pious thought, as in the case of the teacher who gave this problem to her class: "If it takes forty thousand priests and a hundred forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?"[5]

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4. *Id.* at 29.

5. Fichter, *Parochial Schools: A Sociological Study*, 86 (1958).

This conclusion was reached by the Supreme Court of Oregon in *Dickman* v. *School District*, 232 Ore. 238, 243 (1962):

> The evidence establishes, and the trial judge found, that the purpose of the Catholic church in operating St. John's school and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion. The study guides used by the teachers in St. John's school indicate that, to some extent at least, the use of the textbooks furnished by the district is inextricably connected with the teaching of religious concepts. These study guides were prepared by the superintendent of schools of the Archdiocese of Portland. There is no doubt that the teaching of the subject matter in this manner in a public school would be contrary to law.

The same thought has been expressed by Catholic educators. Thus, Monsignor John A. Ryan has stated:

> Since the Church realizes that the teaching of religion and instruction in the secular branches cannot rightfully or successfully be separated one from the other, she is compelled to maintain her own system of schools for general education as well as for religious instruction.[6]

The same point was made by the Supreme Court of Vermont in *Swart* v. *South Burlington Town School District*, 122 Vt. 177, 187-8, 167 A. 2d 514, 520 (1961):

> In this instance the defendant school board has elected to discharge its duty by furnishing secondary education outside the public facilities of the district. For a substantial number of its advanced students at

6. Quoted in 2 A. Stokes, *Church and State in the United States* 654 (1950).

least, the legal and public duty of the district is undertaken in religious denominational high schools that are an integral part of the Roman Catholic Church. The Church is the source of their control and the principal source of their support.

This combination of factors renders the service of the Church and its ministry inseparate from its educational function. That this is a high and dedicated undertaking is not to be questioned, and deserves the respect of all creeds. Yet however worthy the object, the First Amendment commands the State shall not participate.

What is true of the Catholic parochial school is equally true of many Protestant and Jewish day schools. They pursue the same mission and perform the same function for their faith as the parochial schools do for Catholicism.

Thus, a noted Protestant theologian said of the Protestant schools:

> Policywise, these schools fall into three general groups. The first maintains schools because it feels the necessity for doing so is implied in its theological point of view. The second appears to maintain its schools because of the close relationship between its doctrine, its religious practices, and the total culture in which it feels its children and youth must be nurtured. The third group maintains its schools because of the conviction that an education that is not permeated with religious values of a specific Christian sort tends to promote secularism and gives the pupil the idea that religion is a thing apart from the rest of his major concerns.[7]

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7. Wyckoff, *The Protestant Day School,* 82 School and Society 98, 99 (1955).

With respect to Jewish day schools, see *Symposium, the Jewish Day School in America: Its Theory and Practice*, 20 Jewish Education No. 1 (1948); Kaminetsky, *The Hebrew Day School Movement*, 82 *School and Society* 105 (1955). As one noted authority describes the process:

> Integration is incorporated into the subject matter as well. In the expressional arts, general and Jewish arts are combined and taught as one. Jewish history will encompass the history of the many people with whom the Jews came into contact. General geography will include the geography of Israel. The important events studied in the Bible, such as the Exodus from Egypt and the Revelation at Sinai, are associated with the emancipation of the peoples, and especially with the independence won by America, as well as with the doctrines of liberty and democracy that are universal in character and biblical in origin. In the domestic science laboratory nutrition and homemaking are taught along with the laws of Kashruth and Dietary observances.[8]

2. Because the court below granted the defendants' motion to dismiss on the merits, it must be assumed that at least some of the schools being financed under the Act include religion in the teaching of secular subjects.

The complaint in this case alleges in paragraph 13:

> On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are sectarian educational institutions which are (1) controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and

8. Goodside, *Religious and Secular Studies in the Day School*, 24 Jewish Education 55, 56 (1953). See also, Goodside, *Integration of Jewish and General Social Studies in the Day School*, 23 Jewish Education No. 2 (1951).

promotion of a particular religious faith, and (3) conduct their operations, curriculums and programs to fulfill that purpose.

Paragraph 18, setting forth the first cause of action, alleges that the Education Act in dispute is a law respecting an establishment of religion in that it "finances and participates in the blending of sectarian and secular instruction."

Because the case was decided on defendants' motions to dismiss the complaint, it must be assumed that blending of sectarian and secular instruction exists in parochial schools in Pennsylvania. *Cooper* v. *Pate*, 378 U. S. 546 (1964). The opinion of the court below expressly stated that "we accept as true all well-pleaded allegations of fact in the plaintiffs' complaint." Although the court refused to accept as admitted plaintiffs' allegations as a fact that the purpose and primary effect of the Act is to aid religion (also pleaded in par. 18) on the ground that the allegation "asserts not a fact but a conclusion of law and as such is not admitted for purposes of testing the sufficiency of the complaint," nowhere in the court's decision is there or could there be a finding that the factual allegation concerning the blending of sectarian and secular instruction is a conclusion of law.

It is true that the court did say

> As it may apply to sectarian institutions, we concur with the Supreme Court's statement in Allen, supra, that "we cannot agree * * * *either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion (emphasis added by court below).

However, this ignores the fact that the *Allen* case had been disposed of below on the plaintiffs' motion for judgment on the pleadings. It was thus the plaintiffs that had precluded proof on the purely factual issue of commingling of religious and secular instruction.

This is shown by the fact that, immediately following the language quoted by the court below, this Court pointed out that the case had come to it "after summary judgment entered on the pleadings," that there was nothing "in this record" to show that the supplied textbooks were used to teach religion and that "No evidence has been offered about particular schools, particular courses, particular teachers, or particular books" (392 U. S. at 248). Here, the plaintiffs are prepared to prove that the defendant schools, as well as others that are receiving or will receive aid under the Act, conduct their operations in such a manner as to propagate religion in the very operations financed by the state under the Act. Hence, the reliance on *Allen* by the court below was misplaced.

Moreover, the *Allen* case dealt only with textbooks, an item easily examined independently of other aspects of the teaching process. This Court noted that the New York Court of Appeals had construed the statute there challenged as requiring that the textbooks supplied by the state be strictly secular in character (392 U. S. at 245). Here we are dealing with the totality of instruction which must be sectarian at least in part, if the religious character of the school is to be maintained. A school which operates on the assumption that religion must be commingled with all aspects of instruction can still use purely secular textbooks but it cannot secularize its instruction.

It is true, as the court below said, that "the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines." But, as we have shown, some religious bodies that operate schools do not accept that assumption of secularity with respect to any subject. The subjects here involved can be and are taught with a view to propagating religion and the plaintiffs allege that they are so taught in nonpublic schools in Pennsylvania. And, as we shall now see, there is nothing in the decision below that precludes such commingling of the secular and the religious in the operations financed under the Act.

3. Nothing in the decision below bars the flow of funds under the Act to schools that commingle secular and sectarian teaching.

The Act provides state financing of instruction in four specified subjects—mathematics, modern foreign languages, physical science and physical education (Section 4). The only limitations that might be relevant here are (1) the provision in Section 3(3) that "Secular subject" means any course which is presented in the curricula of the state's public schools and shall not include "any subject matter expressing religious teaching, or the morals or forms of worship of any sect," and (2) the provisions in Section 4 that only textbooks approved by the State Superintendent of Public Instruction are to be used, that a satisfactory level of pupil performance in standardized tests approved by the Superintendent be maintained and that, after five years, only certified teachers be used.

It does not appear that the state authorities administering the Act view these provisions as barring the payment of funds under the Act to schools that commingle sectarian instruction with the teaching of the four covered subjects. Nor are we referred to any regulation of the authorities administering the Act that imposes any such limitation. In order to qualify, a school need only establish it is teaching the four statutory subjects, that it is using approved textbooks, that its pupils are passing the standardized tests and that it is using approved teachers.

The court below noted that the Act "does not go so far as to encourage the teaching of religious matter." But it did not say that the statute does not finance religious instruction in the courses which it covers. And the complaint alleges that such financing is being undertaken under the Act.

We submit that affirmance of the decision below would leave the state free to finance all aspects of secular instruction whether or not it is commingled with sectarian instruction. It would permit the state to assume not only the cost of the salaries of teachers and ancillary personnel but also funding of buildings, equipment and supplies. We submit that nothing in the decisions of this Court in *Everson* and *Allen,* on which the court below principally relied, justifies that result.

B. Even if the Instruction Financed by the Act Is Purely Secular, the Act Assists the Propagation of Religion by Relieving Religiously Affiliated Schools of the Cost of Secular Instruction.

The act here under review is a product of a nation-wide drive to give assistance to church-affiliated schools by providing them with funds out of the public treasury. Indeed, what the Act does is to finance, at least in part, the salary and other costs of activities that the schools have been conducting all along, and must conduct in order to serve their intended functions. Hence, it is difficult if not impossible to avoid the conclusion that the aid supplied under the Act contributes to furthering the purpose of those schools. That purpose, of course, is the propagation of religion, as this Court noted in the portion of the opinion in the *Walz* case quoted above (p. 10).

The complaint here alleges that the defendant schools and other nonpublic schools in Pennsylvania "have as their purpose the teaching, propagation and promotion of a particular religious faith" (par. 13). But even if that were not so—and the teaching of secular subjects were now totally secular—the basic purpose of maintaining church-affiliated schools would still be religious indoctrination and the teaching of religion, at least as a separate subject, would continue. Indeed, if the claims of distress referred to in the legislative findings are to be believed, the religious instruction will continue only because the state aid is supplied.

The Act is thus a religious measure, not an educational measure. The principal support for it comes from those

religious bodies that operate their own schools, not from organizations concerned primarily with education. The purpose is to make possible continuation of sectarian religious instruction in church-affiliated schools.

At the least, then, it can be said that the purpose of the sponsors of the legislation is to foster religion. We submit that it is plainly also the purpose of the legislature that passed it. Although the legislative findings contained in Section 2 of the Act speak in terms of providing education for the child, what they actually say is that the state must make it possible to provide part of that education through the medium of the nonpublic school, including those that are established to propagate particular religious beliefs. This means that the legislative purpose is to finance continuation of this kind of religious institution.

The Act we submit has not only an impermissible purpose but also an impermissible effect. The clear, immediate impact of the Act, one stressed by its supporters, is that it makes possible the continuation of the aided schools and thus the continuation of religious instruction. The case for the kind of state aid given by the Act is that, without it (indeed, without a lot more of it), the whole complex of church affiliated schools will have to close. With it, they can remain open. What clearer demonstration of primary effect could be asked?

In short, by undertaking to "subsidize" the church affiliated schools, Pennsylvania "affirmatively foster[s]" them. Brennan, J., concurring in *Walz,* 90 S. Ct. at 1424.

This Court based its decision in *Allen* on its conclusion that "no funds or books are furnished to parochial schools,

and the financial benefit is to parents and children, not to schools" (392 U. S. at 243-244). Here, there is no question that there is a direct "financial benefit * * * to schools." We believe that any such benefit to an institution established to foster religion contributes to that purpose and is therefore a violation of the Establishment Clause. It is that conclusion, we believe, that underlies this Court's statement in *Everson* that "No tax * * * can be levied to support any religious * * * institutions, * * * whatever form they may adopt to teach * * * religion."

POINT II

Government financing of secular instruction in religiously affiliated schools, as provided in the Act, results in a commingling of church and state in a manner prohibited by the Establishment and Freedom of Religion Clauses of the First Amendment.

A. One of the Purposes of the First Amendment Was to Prevent the Entanglement of Government With Religion.

In its interpretation of the First Amendment in *Everson, supra,* this Court said (330 U. S. at 16):

> Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Critics of the "wall" concept have sought to undermine it by oversimplification—belaboring the obvious fact that it

is impossible (and undesirable) to bar all contact between religion and government. Plainly, such contact would be necessary, if only to protect religious freedom. What the "wall" concept does embody is both more narrow and more workable—a prohibition of government dependence on or interference with religion, and *vice versa.*

This is made clear in the most recent decision of this Court interpreting the First Amendment, *Walz* v. *Tax Commission, supra,* where it said (90 S. Ct. at 1411-12):

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Continuing, the Court said:

> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices *or have the effect of doing so.* Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward *government control of churches or governmental restraint on religious practice.* (Emphasis added.)

The Court then went on to assess the purpose of the tax exemption for churches which was there under review and

to hold that it was not to aid religion. It then said (90 S. Ct. at 1414):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an *excessive government entanglement with religion.* (Emphasis added.)

Similarly, Justice Brennan, in his concurring opinion, said (90 S. Ct at 1422):

> Although governmental purposes for granting religious exemptions may be wholly secular, exemptions can nonetheless violate the Establishment Clause if they result in extensive state involvement with religion.

Justice Harlan spoke in the same vein (90 S. Ct. at 1424):

> What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.

It was to prevent such state involvement with religion that this Court ruled last year that a state may not constitutionally involve itself in resolving a church property dispute on the basis of a civil court's interpretation of church doctrine. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U. S. 440 (1969). The Court said (at 449):

> If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.

See also *Schempp*, 374 U. S. at 222:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees * * *.

B. The Act Mandates an Impermissible Entanglement of Government With Religion.

In the words of the *Walz* decision, *supra*, "the end result" of the Act is "an excessive government entanglement with religion" (90 S. Ct. at 1414). In the tax exemption process reviewed in *Walz*, the government merely stood by, withholding use of its power to tax. Here, the government acts affirmatively to support religious institutions and simultaneously involves itself in their operations.

In *Walz*, this Court said (*ibid*) that it is relevant to consider

> * * * whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

No such "impermissible degree of entanglement" was found to exist in that case, and the Court noted in *Walz*,

that this was true also with respect to the bussing of children, upheld in *Everson*, and that there was no evidence in the record in the *Allen* case that the loan of textbooks involved impermissible entanglement. The situation is quite different where the state pays part of the necessary expenses of a church school, as part of a "contract" for the "purchase of secular educational services." Indeed, this Court expressly pointed out in *Walz (ibid)* that

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.

It is further noted in the Court's opinion that tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." Precisely the opposite is true of state financing of church schools.

Even those urging the constitutionality of the Act would, we believe, recognize that some degree of state supervision of the financed operations is unavoidable. This will include supervision designed to enforce the constitutional and statutory provisions which bar state support of sectarian instruction.

The *Allen* case makes it clear that state aid cannot be given to sectarian schools without regard to whether the aid advances religion. The textbook law there involved was upheld only upon a finding that only secular books would be lent and upon the conclusion there was no evidence that the books would be "instrumental in the teaching of religion" (392 U. S. at 248). The plain inference

is that the state cannot finance secular instruction if it is "instrumental in the teaching of religion." Thus, the state officials charged with the administration of the Act, even in the absence of specific statutory limitations, are under a constitutional obligation to see that instruction in the affected courses is secular.

This obligation is recognized to at least a minimum extent in Section 3(3) and Section 4 of the Act, described above. The necessity of this kind of supervision was referred to by Justice Harlan in his concurring opinion in the *Walz* case (90 S. Ct. at 1427):

> Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions. Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case.

The necessity of providing supervision to insure the secularity of financed operations has been recognized in some of the statutes enacted in other states granting financial aid to nonpublic schools. For example, Connecticut recently enacted a "Nonpublic School Secular Education Act" (Public Act 791, Conn. Laws 1969), providing for reimbursement by the state of a portion of the expenses of the textbooks and teachers' salaries for teaching secular subjects. The legislative findings (Section 2) note: "To the extent these church established schools teach secular subjects *in a secular manner,* they are entitled to the same assistance as other nonpublic schools" (emphasis added).

Consistently with this finding, the body of the statute defines the term "secular subject" as one in which "the manner of teaching does not indoctrinate, promote or prefer any religion or denominational tenets or doctrine," and as not including "any instruction in religious or demominational tenets, doctrine or worship" (§3(f)). Section 13 further provides that the secretary of the state board of education "shall make provision for visitation and inspection of every nonpublic school which applies for approval under this act and for the *visitation and inspection thereafter* as may be necessary to assure that said school is complying with good educational standards, meeting adequate safety, sanitary and construction requirements, and *fulfilling the requirements of this act.*" (Emphasis added.)

Rhode Island, in 1969, similarly provided for salary supplements for the teachers of "subjects required to be taught by state law *to the same extent as those subjects are taught* in public schools * * *" (R. I. Gen. Laws, §16-51-3, subd. 1 (Supp. 1969); emphasis added). Subdivision 4 of the same section requires that the teachers use "only teaching materials which are used in the public schools of the state." Subdivision 5 prohibits any teacher receiving salary supplements from teaching religion, even in a separate course.

A statute adopted in Ohio in 1969, also providing aid to nonpublic schools, provides that "to determine whether the services, materials and programs provided for the benefit of nonpublic school pupils pursuant to this division achieve the purposes of encouraging and enhancing the means of secular instruction and of promoting the continued availability of high quality general education in

nonpublic schools, the superintendent of public instruction shall periodically review courses of study, programs of student and teacher evaluation, and pupil achievement tests utilized in nonpublic schools" (Ohio Rev. Code §3317.06(H) (Supp. 1969)).

How, one may ask, can compliance be assured unless the state frequently sends representatives into the classrooms to see that no "subject matter expressing religious teaching" is introduced in Pennsylvania, that the "manner of teaching does not indoctrinate" in Connecticut, or that, in the day-to-day operations of nonpublic schools in Rhode Island, no teaching materials are used that are not used in the public schools? While one single examination of a textbook being considered for use is sufficient to ascertain whether or not it is sectarian, a teacher's classroom instruction and materials would require constant supervision as to their contents. How can there be an assurance that a teacher, teaching mathematics in a Catholic parochial school, will not use the mathematics example noted above, or will not use rosary beads for teaching counting? Similarly, how can the state be assured that the teacher of modern Hebrew in a Jewish day school in Pennsylvania does not include some reference to Jewish "forms of worship," precluded by the Act?

We do not mean to imply by these questions that every religious school, although aware of a requirement of secularity in state-financed courses, will strive to sectarianize them as far as possible. We assume a majority will not. But some may do so in gross form. Others will introduce practices that are arguably sectarian.

Who then will determine whether the fine line between sectarian and secular has been breached? Does this not, in the words of Justice Harlan, concurring in *Walz* (90 S. Ct. at 1426), "entangle government in difficult classifications of what is or is not religious?"

We recognize, of course, that the state must draw these lines in deciding on the curriculum and other practices in public schools. *Schempp* case, *supra*. This is quite different from placing itself in a supervisory and possible adversary position with respect to religious groups in the operation of *their* schools.

Among other things, such a situation would inevitably open the state to conflicting pressure from various religious and nonreligious groups not only as to the manner in which the responsibility of supervision is performed but also as to the choice of officials to be charged with that responsibility.

The involvement of the state in religion through these arrangements is paralleled by the correlative evil of loss of freedom on the part of the affected religious institutions. We have argued above that the Act, at least as construed by the court below, permits financing of religious schools without respect to whether they adhere in practice to the view that the tenets of their sect must be interwoven into all aspects of instruction. If that is not so, there is no avoidance of the other horn of the dilemma —permitting, if not, requiring the state to prohibit, and to police the prohibition of, such interweaving. We believe that the First Amendment was designed to prevent such commingling of state and religion—that it is essen-

tial to prevent "the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." *Walz* case, *supra*, 90 S. Ct. at 1412.

In sum, the dangers we have referred to above are precisely those which the First Amendment was designed to forestall. This was shown in Justice Rutledge's dissent in the *Everson* case (330 U. S. at 53-54):

> The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. Id., Par. 7, 8. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. Id., Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. Ibid. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. Id., Par. 11.

POINT III

Insofar as the Act authorizes the payment of public funds to private schools which are racially segregated, it violates the Equal Protection Clause of the Fourteenth Amendment.

A. The Private Schools Which Are Beneficiaries of Funds Under the Act Are Racially Segregated.

The allegations contained in the complaint, which must be taken as true in this phase of the case, include the following in paragraph 5:

> Non-public schools, including the defendant schools are, de facto, racially segregated, either by religious requirement, design, tradition, policy, quota, cost or residential pattern, and the aid rendered to such schools will perpetuate and promote such racial segregation in that said subsidy will further enable private schools to increase their enrollment, which increase in enrollment will be exclusively or almost exclusively white, which, in turn, will increase the percentage of Negro enrollment in the public schools, thus aggravating said de facto segregation and, in turn, strengthening the preference of many white parents to enroll their children in non-public schools (by reason of the racial prejudice of said parents or because the public schools will necessarily become inferior by reason of obtaining a smaller percentage of the total funds which the community is prepared to commit for education), which will, in turn, generate political pressures for even greater tax aid to private schools, justified by their increased enrollment, with the ultimate result of promoting two school systems in the Eastern district of Pennsylvania—a public school system pre-

> dominantly black, poor and inferior, and a non-public school system predominantly white, affluent, and superior.

There is ample reason for believing that these allegations can be substantiated on trial. Thus, we note that the plaintiffs submitted a memorandum in the court below setting forth the specific information which they were prepared to offer in support of this allegation. This included evidence that the non-church-related schools in Pennsylvania and the non-Catholic church-related schools were all virtually 100 per cent white. The Catholic parochial school system, while it contains a substantial proportion of black students is nevertheless largely segregated. A very large proportion of the Catholic schools are either all white or all black.

Available evidence supports this allegation. The periodical *Commonweal* in its October 7, 1966 issue quoted the following statement of Richardson Dilworth, former Mayor and current School Board President in Philadelphia:

> Today, in our city, 40 per cent of the total school population is in parochial and private schools. The result is that while only 30 per cent of our city's population is non-white, 57 per cent of our public school pupils are non-white. And, today, there are more white children in parochial and private schools than there are in our city's entire public school system (page 13).

The following facts are set forth in the 1967 Report of the United States Commission on Civil Rights entitled "Racial Isolation in the Public Schools":

> Private and parochial school enrollment, which is overwhelmingly white, also is a significant factor in the

increasing separation of white and Negro school children. (page 31)

In 1960, of the more than four million pupils enrolled in non-public elementary schools in the United States, only 140,529 were non-white. 44,308 non-whites were attending non-public secondary schools which had a total enrollment of more than one million. (page 31, footnote 50)

Private and parochial school enrollment also is an important factor in the increasing concentration of Negroes in city school systems. Non-public school enrollment constitutes a major segment of the nation's elementary and secondary school population. Nationally, about one-sixth of the total 1960 school enrollment (Grades 1-12) was in private schools. In metropolitan areas the proportion is slightly higher, and divided unevenly between city and suburb. Nearly one-third more elementary school students in the cities attend nonpublic schools than in the suburbs. Almost all of them are white. In the larger metropolitan areas the trend is even more pronounced. * * * [A] much higher proportion of white city students than white suburban students attend private and parochial elementary schools. Nonwhites in these metropolitan areas, whether in cities or suburbs, attend public schools almost exclusively. (pages 38-39)

A table, following this statement, shows the following proportion of total elementary students, by race, in public and nonpublic schools, for 15 metropolitan areas in 1960:

Central Cities:	White	Nonwhite
Public Schools	61%	94%
Nonpublic Schools	39%	6%
Suburbs:	**White**	**Nonwhite**
Public Schools	75%	97%
Nonpublic Schools	25%	3%

(page 39)

The foregoing figures illustrate both for Pennsylvania and the whole area of the United States the well-known fact that the enrollment of Negro children in private schools is very low and far below the ratio of Negroes in the total population.

Among the reasons why few Negro children are found in private schools are the following: few Negroes are in a financial position to pay the tuition fees required by private schools. The Catholic parochial schools—the overwhelming majority of private schools[9]—attract mostly Catholic children and relatively few Negroes are Catholics. There are very few Negro Jews, as a result of which the Jewish day schools are virtually a hundred per cent white. Most private schools are situated in white neighborhoods, which makes attendance by Negro children inconvenient. Negroes prefer to send their children to public schools where racial discrimination is prohibited by the Equal Protection Clause of the Fourteenth Amendment. (The Pennsylvania Fair Educational Opportunities Act prohibiting discrimination in private education and providing for machinery to enforce such prohibitions does not generally apply to elementary and secondary schools. 24 P.S. (Purdon) §5001, *et seq.*)

The financial aid granted to private schools by the Act makes these schools less dependent on the tuition fees paid by the parents of children attending private schools. To the extent that these schools are able to maintain tuition

9. Of the pupils in nonpublic schools in Pennsylvania, 96.6% attend church-affiliated schools. See text at footnote 1.

fees on a relatively low level as a result of the public subsidy they receive, there will be a further movement from the public school system to the private schools.

In sum, the percentage of white children in public schools is considerably lower that it should be on the basis of the white-black ratio in the population. Many public schools, even in racially mixed neighborhoods, are becoming Negro schools because of the movement of white children to private schools. This leads, in effect, to a dual system of schools, the public schools attended predominantly by blacks and the private schools, including parochial schools, attended predominantly by whites.

B. The Use of Public Funds to Maintain and Perpetuate Racial Segregation Is Prohibited.

In *Brown* v. *Board of Education of Topeka,* 347 U. S. 483 (1954), this Court declared racial segregation in public education to be a denial of the equal protection guaranteed by the Fourteenth Amendment. It held unconstitutional the dual system under which whites and Negroes were required to attend different schools in a number of Southern states. A year later, in its implementing order, this Court required public school boards to abolish such dual school systems and to effectuate the transition to racially non-discriminatory school systems. 349 U. S. 294, at 301 (1955). In subsequent decisions, this Court reaffirmed its decisions in *Brown I* and *Brown II* and made it clear that the time has run out for efforts to delay school integration. *Cooper* v. *Aaron,* 358 U. S. 1 (1958); *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964); *Green* v. *County School Board of New*

Kent County, 391 U. S. 430 (1968); *Raney* v. *Board of Education of the Gould School District*, 391 U. S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.*, 391 U. S. 450 (1968); *Alexander* v. *Holmes County Bd. of Ed.*, 396 U. S. 19 (1969).

In *Brown I*, this Court based its conclusion that the dual system is unconstitutional on the discrimination which is inherent in a separation of pupils by race. The Court said (374 U. S. at 494):

> To separate them [Negro pupils] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

This Court has not yet decided the question whether a school system which does not require whites and blacks to attend different schools but where, as a result of a segregated residential pattern, white and black pupils to a large extent attend different schools, amounts to a dual system which is in conflict with the Equal Protection Clause of the Fourteenth Amendment as interpreted in *Brown I* and *II*. This is the problem of the so-called "*de facto*" segregation. Those who believe that such *de facto* segregation is unconstitutional, as the *amici* herein do, base their view on the above-cited language in *Brown I* which described the evils of racial separation and the discrimination which it creates in general terms without distinguishing among the causes for such separation. Further, they believe that the requirement of discriminatory state action as a prerequisite for the application of the Fourteenth Amendment, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948),

is fulfilled because the state is responsible for having set up a school system based on the neighborhood principle from which the racial segregation flows.

There have been a number of court decisions holding that segregation in public education which is the result of the residential pattern is in violation of the Fourteenth Amendment. See for example *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 543 (D. Mass. 1965), *rev'd on other grounds*, 348 F. 2d 261 (1st Cir. 1965); *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *Jackson* v. *Pasadena City School District*, 31 Cal. Rptr. 606, 382 P. 2d 878 (1963); *Blocker* v. *Board of Education of Manhasset*, 226 F. Supp. 208 (E.D.N.Y. 1964); *Branche* v. *Board of Education of Hempstead*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Booker* v. *Board of Education of Plainfield*, 45 N.J. 161, 212 A. 2d 1 (1965); *Brewer* v. *School Board of the City of Norfolk*, 397 F. 2d 37 (4th Cir. 1968); *Spangler* v. *Pasadena City Board of Education*, U. S. District Court for the Central District of California, Civil Docket No. 68-1438-R, filed January 20, 1970; and *Crawford* v. *Board of Education of the City of Los Angeles*, California Superior Court for the County of Los Angeles, Civil Docket No. 822-854, filed February 11, 1970.

On the other hand, three Federal Courts of Appeals have reached the opposite conclusion, on the ground that such segregation is a result of fortuitous circumstances (residential patterns) with no state action involved so that the Equal Protection Clause does not come into play. In the view of these courts, the school authorities have no

obligation to eliminate *de facto* segregation which has been brought about without the active involvement of the state. *Bell* v. *City of Gary, Indiana,* 324 F. 2d 209 (7th Cir.), *cert. denied,* 377 U. S. 924 (1964); *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir.), *cert. denied,* 380 U. S. 914 (1965); *Deal* v. *Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966), *cert. denied,* 389 U. S. 847 (1967), 419 F. 2d 1387 (6th Cir. 1969).

In the court below, defendants relied on the 1966 decision in *Deal* to support their view that a statute which provides financial aid to private, including parochial, schools does not violate the Fourteenth Amendment. They view the racial segregation which results from the existence of private schools, including parochial schools, as described above under sub-point A, as constitutionally of the same nature as segregation resulting from neighborhood schools, namely, as a type of segregation not based on state action and therefore outside the province of the Fourteenth Amendment.

However, plaintiffs in this action do not attack the pattern of segregation which results from the operation of private schools, *per se.* The thrust of their complaint is directed against the state which, by providing financial aid to private schools and thus helping to maintain and perpetuate the pattern of segregation resulting from the existence of these schools, engages in discriminatory state action.

There is no question that the authorized payment of public monies is state action. *Cooper* v. *Aaron,* 358 U. S. 1, 19 (1958); *Poindexter* v. *Louisiana Financial Assistance*

Commission, 258 F. Supp. 158, 162 (E.D. La. 1966); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 854 (E.D. La. 1967), *aff'd*, 389 U. S. 571 (1968). See also 79 HARV. L. REV. 841 (1966). It is direct state action, not indirect, as defendants in their brief below seem to suggest. In fact, it is hard to imagine any action which can be attributed to the state more closely and intimately than the authorized payment of state funds. The crucial question then is whether payment of state funds to private, including parochial schools, under the Act is *discriminatory* state action.

There is ample authority for the proposition that public aid to private schools or to pupils attending private schools which serves to support racially segregated education constitutes denial of equal protection in violation of the Fourteenth Amendment. This Court said in *Cooper* v. *Aaron*, *supra* (358 U. S. at 19):

> State support of segregated schools through any arrangement, management, *funds* or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

Repeatedly, Federal courts have struck down on the same ground state plans to provide for tuition grants for students attending private schools. *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U. S. 569 (1961); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U. S. 515 (1962); *Poindexter* v. *Louisiana Financial As-*

sistance Commission, supra; *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969).

The principle that the use of public funds to support activities by private persons or groups which involve racial discrimination denies equal protection is applied also in fields other than education. See e.g., *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963);[10] *Ethridge* v. *Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967). And see Executive Order No. 11246, September 28, 1965, 30 F.R. 12319, on equal employment opportunity, and Executive Order No. 11063, November 24, 1962, 27 F.R. 11527, on equal opportunity in housing.[11]

In some of the cases cited above, the courts found that grants of public funds to educational institutions were made for the purpose of evading desegregation of public schools and perpetuating racial segregation. But such a discriminatory purpose is not a prerequisite for holding that a grant to an educational institution is in violation of the Equal Protection Clause. All that is required is that

10. In *Simkins*, Negro physicians complained that government funds were given to two hospitals which discriminated against them because of their race and also discriminated against Negro patients because of their race. They did not seek an injunction against public support of discrimination or segregation, but an injunction against the discriminatory conduct of the recipients of the funds. In the present case, in contrast, plaintiffs do not seek an injunction against discriminatory conduct of the schools, but an injunction against state support of discrimination. Either remedy is suitable to eliminate a violation of the Fourteenth Amendment's prohibition to use public funds to maintain racial discrimination and segregation.

11. That the payments authorized by the Act are actual grants and not payments under a contract to purchase secular educational services as suggested by the language of the bill, has been succinctly demonstrated by Judge Hastie in his dissenting opinion in the court below.

the grant has the effect of maintaining or perpetuating segregation.

In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961), this Court said expressly:

> * * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them *whatever the motive may be*. It is of no consolation to an individual denied the protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend on such a distinction (emphasis added).

And see cases there cited (*id.* at 725, n. 2).

Applying this principle, it was held in *Poindexter II*, *supra*, that the fact that grants to private schools had the effect of "assisting whites to flee to private schools," 275 F. Supp. at 856, provided an independent ground for the holding that the state law authorizing such grants was unconstitutional. After stating that the purpose of the Act involved in that case was discriminatory, the court continued: "We hold *also* that Act 147 of 1962 is unconstitutional in its actual effect." *Id.* at 857 (emphasis added).

Hence, all that plaintiffs in the present case have to allege—as they have done—and to prove—which they are prepared to do if and when the case goes to trial—is that aid given to nonpublic schools, including parochial schools, under the Act promotes racial discrimination and segregation in the defendant schools. It can be said, in addition, that the effect of the Act is to "encourage" parents of white children to leave public schools and thus to aggravate

and perpetuate patterns of racial segregation in education. See *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

Returning to *Burton, supra*, defendants in their brief submitted to the court below cited the language in that decision stating that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." 365 U. S. at 722.

The "significant involvement" doctrine of *Burton* would apply in the present case only if plaintiffs sought a judgment restraining defendant schools from discriminating or segregating on a racial basis. Only then would the question arise as to whether the state involvement in the school operation as a result of its providing funds is so significant that such operation becomes state action. But the thrust of the complaint in the present case is directed at the *state* because of the aid it gives to those schools; as mentioned before, there can be no question that such aid constitutes state action regardless of whether the amounts given are small or large. (See *Poindexter II, supra*, where it was said that "the payment of public funds *in any amount* through a state commission under authority of a state law is undeniably state action." 275 F. Supp. at 854 (emphasis added)).

Quite apart from that, it cannot be gainsaid that the assistance given to private (including parochial) schools under the Act is "significant" under any meaning of this term. The complaint alleges in paragraph 16 that the seven defendant schools have applied for payment under the Act

in the total sum of over $270,000, and that other private and sectarian educational institutions have applied for payments under the Act in the total amount of $16,833,884.32. The very purpose of the enactment, expressed in its preamble, that is, to alleviate the burdens borne by the private schools in Pennsylvania, establishes the significance of the state support of private schools as authorized by the enactment. If these grants are significant in supporting the operation of those schools, they also thereby significantly contribute to the maintenance and perpetuation of the segregated pattern which permeates these schools.

POINT IV

Plaintiffs have standing to raise the question of equal protection.

The court below never reached the question whether the state by providing public funds to private schools which are largely segregated, violates the Equal Protection Clause of the Fourteenth Amendment because it denied all plaintiffs standing to raise this issue. The *amici* disagree with this ruling for the following reasons:

One of the plaintiffs, Alton J. Lemon, is the father of a Negro child attending a public school in Pennsylvania. It is alleged in the complaint that the effect of the assistance given to private schools under the Act is to promote the dual system of education in Pennsylvania consisting, on the one hand, of a string of private schools predominantly white, affluent and superior and, on the other hand, of the public school system predominantly black, poor and inferior. It has also been alleged that the result of the

aid given to private schools is a continuing flight of white students from public schools to private schools, thus aggravating even more the pattern of segregation. It follows that young Lemon, whose father is one of the plaintiffs acting in his behalf, is directly and personally affected by the operation of the Act authorizing the state to grant financial assistance to private schools. The effect which the support of private (including parochial) schools under the Act has on the racial composition of public schools is not hypothetical, but actual and present, according to the allegations of the complaint.

It follows that plaintiff Lemon in this action vindicates the constitutional right of his child not to be subjected to segregated education. Hence Mr. Lemon has standing under the basic rule that a person may vindicate his own constitutional rights. *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953). See also *Poindexter I*, *supra*, and *Griffin* v. *State Board of Education*, 239 F. Supp. 560, 562 (E.D. Va. 1965); see also Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922, 952-54 (1968). Mr. Lemon's position in this matter is no different from that of plaintiffs in *Alexander* v. *Holmes County Board of Ed.*, *supra*, and the other cases on desegregation and integration decided by this Court [illegible] es, plaintiff Negroes claimed that [illegible] n were directly affected by discrimina[illegible] in public schools. Like the plaintiffs in t[illegible] mon and his child have "a personal st[illegible] the controversy." *Baker* v. *Carr*, 369 U[illegible] 2), cited in *Flast* v. *Cohen*, 392 U. S. 83, 9[illegible]

Therefore there is no need in the present case to carve out a special exception to the general rule as was done in *Barrows* v. *Jackson* where a white person was granted standing to complain that the enforcement of a restrictive covenant against a Negro deprived the latter of the equal protection of the laws. Instead, the general rule applies, under which a person may claim standing in this Court to vindicate his constitutional rights.

If Mr. Lemon has no standing to bring the present action, there would be no possible way of contesting the grants made under the Act on the ground that they constitute a violation of the equal protection of Negro children in the public schools. Obviously, neither the schools which received state aid nor the children attending such schools can be expected to contest the granting of such aid.

Maintenance of constitutional government requires that there be *some* way of testing the constitutionality of laws and administrative acts. Otherwise the very foundation of our Constitution would be subverted. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

The rules governing standing should be given a liberal interpretation to facilitate the review of laws and administrative acts as to their constitutionality. It is for these reasons that the *amici* believe that all plaintiffs in the present case should be held to have standing to raise the constitutional question based on the Equal Protection Clause.

Conclusion

It is respectfully submitted that the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1[redacted] 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN VOCATIONAL ASSOCIATION, ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, HORACE MANN LEAGUE OF THE UNITED STATES, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, NATIONAL EDUCATION ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, AND RURAL EDUCATION ASSOCIATION, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1189

ALTON J. LEMON, *et al.*,
Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, *et al.*,
Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN VOCATIONAL ASSOCIATION, ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, HORACE MANN LEAGUE OF THE UNITED STATES, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, NATIONAL EDUCATION ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, AND RURAL EDUCATION ASSOCIATION, *AMICI CURIAE*

Interest of the *Amici*

The organizations submitting this brief represent hundreds of thousands of Americans directly and substantially involved in public education as teachers, administrators and members of school boards.

"Designed," as Mr. Justice Frankfurter noted,[1] "to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," our public school system rests on three fundamental principles of universality—universality of control, of access and therefore of support. The public school system is controlled by all of the public, even by those whose children do not attend it.[2] It is open to all; it may not exclude children whose parents are too poor to pay taxes any more than those whose parents are wealthy enough to pay tuition at private schools. It may not exclude children because of their race,[3] religion,[4] political beliefs,[5] or because their standards of behavior or intellectual achievement may be below those the school authorities would like to maintain. And because it may not close its doors to any of the public, it is constitutionally entitled to financial support out of taxes imposed

1. *McCollum* v. *Board of Education*, 333 U. S. 203, 216 (1948) (concurring opinion).

2. *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969).

3. *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

4. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

5. *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967).

upon all of the public, even of those who have no children or elect to send their children to nonpublic schools.[6]

We are not unaware of the failings of the public school system. We recognize that it is being subjected to widespread criticism, particularly in its operations in crowded, impoverished urban areas. To a substantial extent, this criticism attributes to the public schools responsibility for so much of the ills of urban poverty, thus perhaps revealing how much is expected of them. Nevertheless, recognizing the deficiencies of public education, we believe that the solution is to be sought in improvement, not in dismemberment.

America has great faith in its public school system. We believe that this faith is not misplaced. The American public school system is one of the most precious contributions we have made to modern civilization. It would be a tragedy not only for America but for all the world if it were destroyed.

The statute challenged in this case is but one of the many increasingly successful efforts throughout the nation to siphon off public funds for nonpublic schools. Unless halted, the inevitable result will be a proliferation of private schools with an escalation of the exodus of middle class children from public schools. The end result cannot be anything but a public school system inhabited almost exclusively by the disadvantaged poor. We would be returning to the days of the degrading charity schools although they would now be euphemistically labeled public schools.

6. *Stuart* v. *School District No. 1*, 30 Mich. 69 (1874).

Because we believe that the current extensive effort to divide tax-raised funds between public and nonpublic schools represents the gravest crisis public education has faced in its history, we are submitting this brief *amici curiae* with the consent of the parties.

The Nature of the Action

This is a suit challenging the constitutionality, on its face and as applied, of a law enacted by the State of Pennsylvania in June of 1968 providing for the purchase by the State of the services of teachers in nonpublic schools in teaching certain secular subjects to the children attending those schools. Under the statute, no professional requirements are imposed in respect to teachers presently employed in the nonpublic schools or those engaged within five years after the effective date of the statute. Thereafter, new teachers employed will be required to hold certification by the Department of Public Instruction equal to the standards for teachers in public schools. However, in order to receive payment for the educational services rendered, only textbooks approved by the Superintendent of Public Instruction may be used and a satisfactory level of pupil performance in the particular subjects shall have been attained.

The statute neither requires nor contemplates that the services so compensated shall be available to all the children of the State equally. No provision in the statute imposes any obligation upon a school wishing to avail itself of the benefits of the statute to admit children it otherwise would not admit. The act contemplates that the nonpublic

schools will continue to teach the children they have been teaching in the past. Nothing in the statute forbids them from excluding children on the basis of race, religion, poverty, inability to meet prescribed aptitude or achievement standards, maintenance of prescribed behavior standards, or any other ground. The rationale of the act is that if the nonpublic schools closed down and the children were therefore transferred to the public schools the cost of educating them there would be substantially higher than that involved in purchasing from the nonpublic schools the cost of the secular services of their teachers. It should be noted that while the statute requires that the nonpublic schools achieve satisfactory levels of pupil performance, nothing in it precludes a school from expelling (and thus sending to the public schools) children unable to attain those levels.

The plaintiffs in the action are a number of individual residents and taxpayers of the State, one of whom is a Negro parent of a child attending a public school, and several organizations. The organizations—the Pennsylvania State Education Association, the Pennslyvania Conference of the National Association for the Advancement of Colored People, the Pennsylvania Council of Churches, the Pennslyvania Jewish Community Relations Conference, Americans United for Separation of Church and State, and the American Civil Liberties Union—share as a common objective the separation of church and state and the opposition to the use of public funds for the support in whole or in part of sectarian schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion.

The defendants in the suit are the State Superintendent of Public Instruction and the State Treasurer, and seven sectarian educational institutions. After motion to dismiss was filed, limited intervention was granted to the Pennsylvania Association of Independent Schools.

The complaint asserts three causes of action: That the act on its face and as applied violates (1) the Establishment Clause of the First Amendment, (2) the Free Exercise Clause of the First Amendment, and (3) the Equal Protection Clause of the Fourteenth Amendment.

None of the defendants filed answers to the complaint. Instead, they moved to dismiss the complaint. The District Court, with Chief Circuit Judge Hastie dissenting, ruled that (1) the individual plaintiffs have standing to bring the action but the organizational defendants do not; (2) neither has standing to assert the Equal Protection claim; and (3) the complaint fails to state a claim upon which relief can be granted.

The Question to Which This Brief Is Addressed

This brief is addressed to the single question whether the statute, if applied to schools organized, controlled and operated to propagate and promote a particular religion, violates the Establishment Clause of the First Amendment.

Summary of Argument

Viewing the situation as it actually is rather than as labeled by the Pennslyvania legislature, the statute here challenged provides for direct subsidization out of public funds of schools organized, controlled and operated to propagate particular religious faiths. Under the principle whose origin antedates the First Amendment but which was most authoritatively expressed in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), such subsidization is violative of the First Amendment. This principle has never been repudiated by this Court and remains today the law of the land. However, even if the court below was correct in applying only the purpose-effect test expressed in its present form in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963), the statute is likewise unconstitutional, since its purpose and certainly its effect is to advance religion. Finally, applying the test most recently expressed by this Court in *Walz* v. *Tax Commission,* 90 S. Ct. 1409 (1970), the statute provides for such entanglement of the state in religion as the Court in *Walz* held to be forbidden by the First Amendment.

ARGUMENT

1. The Posture of the Controversy

As the court below noted, a notion to dismiss for facial insufficiency according to well-settled law admits the well-pleaded facts in the complaint. Granting of the motion is a determination that no matter what the plaintiffs may prove within the reasonable scope of the factual allegations, they will not be entitled to prevail. Applying that principle to the present case, the court held that although

the complaint alleged that the challenged law has as its purpose and primary effect the advancement of religion, that allegation is not one of fact but a conclusion of law, and hence is not deemed admitted (App. A. 88-89). The court determined (not, of course, found) that the statute did not have as its purpose and primary effect the advancement of religion, and hence was constitutional.

Under the test applied by the court, if *either* the purpose *or* the primary effect of the statute is the advancement of religion, the statute is unconstitutional. The complaint herein alleges that the statute on its face and *as applied* has the effect of advancing religion. By denying the plaintiffs the opportunity of proving how the statute is in fact carried out, the court held that irrespective of what is done under the statute (so long, of course, if it does not violate its express terms), it cannot as a matter of law have the effect of advancing religion.

We believe this to be erroneous. Even if legislative purpose be deemed a matter of law not admitted on a motion to dismiss for insufficiency, the same cannot be true of effect. The effect of the statute is not something that can be judicially decreed. In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), the Court did indeed decide the issues without a trial, but there the complaint challenged the statute only on its face and not as applied, and, in addition, both sides moved for summary judgment without trial thereby conceding that no factual issues needed to be determined.

Assuming that the allegations in the complaint regarding purpose and effect are conclusions of law and hence

not deemed admitted, the same certainly cannot be said of the allegations that the institutional defendants herein and most of the other educational institutions which have applied for payments under the act are sectarian institutions which are (1) controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) have policies and practices which exclude from admission or otherwise discriminate against persons by reason of race, and (5) which discrimiate by reason of race or religion in the employment of teachers and other persons to administer the educational services specified in the statute (App. A. 12-13).

We find it difficult to believe that no matter what test for constitutionality under the Establishment Clause is applied, a statute which allows public funds to be used to finance even secular instruction in such institutions can be upheld.

2. Purchase or Subsidy?

The dismissal of the complaint without trial deprived the plaintiffs of the opportunity to establish by an examination into the legislative history of the statute that its purpose was to subsidize nonpublic schools. We submit, however, that unless the courts close their eyes to what everyone else can see, they can hardly fail to see that what is called a purchase of services is nothing but a subsidy under a different label.

"Two great drives," Mr. Justice Rutledge said in his dissent in *Everson* (330 U. S. at 63), "are constantly in mo-

tion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."

The former drive has been blunted to a large extent by this Court's decisions in *McCollum, supra, Engel* v. *Vitale*, 370 U. S. 421 (1962) and *Schempp, supra.* But no one who reads the daily newspapers can be unaware of the ever increasing intensity with which the second drive is being pursued today. Within the last two years at least, seven states have undertaken to give subsidies to parochial and other private schools. (See, dissenting opinion of Mr. Justice Douglas in *Walz*, 90 S. Ct. 1434.[7]) In practically all cases, as in Pennsylvania, a major justification for the enactment of the statute is that unless the private schools receive financial aid from the state, they may be forced to close, thus imposing upon the public schools the added burden of educating the children of the private schools.[8]

In determining the constitutionality of a state statute, the Federal courts are not bound by legislative statements

7. To the five states cited—Pennsylvania, Ohio, New York, Connecticut and Rhode Island—must be added Iowa, Senate File 1293, approved April 29, 1970, and New Hampshire (ch. 51, approved May 4, 1970). Efforts in Maine and Massachusetts to enact similar laws were frustrated at least temporarily by adverse advisory opinions of the highest court in each state. Opinion of the Supreme Judicial Court, —— Me. ——, 261 A. 2d 58 (1970); Opinion of the Supreme Judicial Court, —— Mass. —— (decided May 11, 1970).

8. Such justification for subsidization of parochial schools is hardly new. It has often been asserted and has consistently been judicially rejected. An unconstitutional means of achieving an objective does not become permissible because it is cheaper than constitutional means. See *Opinion of the Supreme Judicial Court of Maine, supra.*

of purpose or by findings in the statute. The First Amendment would be little more than a parchment barrier if judicial scrutiny were foreclosed by the incantation of some ritual such as "secular purpose and effect." As this Court said in *Evans* v. *Abney*, 90 S. Ct. 628, 633 (1970):

> No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated.

One of the factors in the search for fact and truth is the historical context of the statute. Mr. Justice Brennan recently pointed this out in his opinion in *Adickes* v. *S. H. Kress & Co.*, 38 U.S.L.W. 4434 at 4447 (June 1, 1970):

> A legislative or constitutional provision need not be considered in isolation, but may be examined "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" Reitman v. Mulkey, 387 U. S. 369, at 373 (1967).

The application of this principle to the Establishment Clause was recently exemplified in *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). There the Court invalidated under the Establishment Clause a state statute forbidding the teaching of evolution in the public schools. The statute itself made no mention of religion or the Bible. Nevertheless, the Court found that the statute came out of the same historical context that spawned the Tennessee "monkey law" which gave rise to the famous Scopes trial and found that the purpose of the law was to protect fundamentalist sectarian doctrine from impairment by public school teaching.

Applying this principle to the present case, the Court may judicially note that various devices have been and are continuing to be contrived to effect subsidization without appearing too flagrantly to be violating the First Amendment and state constitutional prohibitions.[9] The Pennsylvania statute challenged herein is clearly one such device. Labeled a contract for the purchase of services, the transaction between the state and the sectarian school is no such thing. The school receives public funds for continuing to do what it has always been doing and what it has legally been required to do. The same teachers continue to give the same instruction to the same children in the same place and at the same time and under the same ecclesiastical control as theretofore. No child has a legal right to enter the school and demand participation in the instruction paid for by the public.

It is true that under the statute a school desiring to receive its benefits must use state-approved textbooks, achieve a satisfactory level of pupil performance and, five years hence, employ to teach the secular subjects only teachers who are certified by the state. But measured by classic concepts of contract law, this hardly constitutes legal consideration. It is within the constitutional power to impose these and similar requirements upon nonpublic schools. *People* v. *Donner,* 199 Misc. 643, 99 N.Y.S. 2d 830, *aff'd* 278 App. Div. 705, 103 N.Y.S. 2d 757, *aff'd* 302 N.Y. 857, 100 N.E. 2d 48, *appeal dismissed,* 342 U. S. 884 (1951); *Kansas* v. *Garber,* 197 Kan. 567, 419 P. 2d 896,

9. A recent example is a New York statute, enacted April 20, 1970, which appropriates public funds to sectarian schools purportedly to meet their expenses in keeping attendance and other records required by law.

appeal dismissed, 389 U. S. 51 (1967). Many states in fact do so. See, National Education Association, *The State and Sectarian Education* (1946).

The Supreme Judicial Court of Massachusetts found no difficulty in recognizing a statute similar to and patterned after the one here challenged to be nothing but a subsidization law under a different label. In *Opinion of the Supreme Judicial Court,* —— Mass. —— (decided May 11, 1970) it unanimously held that the statute violated Section 2 of Article XLVI of the state constitution which provides that "no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated."

Recognizing the reality of the situation, the issue to be decided by this Court is whether the First Amendment permits the state to subsidize the operations of an educational institution ecclesiastically controlled, organized and operated for the purpose of propagating and advancing a particular religious faith, and limited in its admission and employment policies to adherents of that faith. We submit that whatever test is used, such subsidization is not permissible else the First Amendment means nothing.

3. The *Everson* Test

In *Everson*, the Court ruled that a state (New Jersey) could constitutionally finance bus transportation of children to parochial as well as public schools. The Court found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road. The Court said (330 U. S. at 16):

> We must consider the New Jersey statute in accordance with the * * * limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power *even though it approaches the verge of that power.* * * * *New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.* On the other hand, other language of the amendment commands that New Jersey cannot * * * exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. * * * (Emphasis supplied.)

The Court then set forth the following paragraph which has become the most authoritative, frequently reiterated and almost classic exposition of the meaning of the Establishment Clause (*id.* at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions,

> or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis supplied.)

The New Jersey statute was upheld because the "state contributes no money to the schools" and "does not support them" (330 U. S. at 18).

In *McCollum*, the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that, "*No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*" (Emphasis supplied.) 333 U. S. at 210.

In *Zorach* v. *Clauson*, 343 U. S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was in-*

volved. The Court said (at 314): "*Government may not finance religious groups* nor undertake religious instructions *nor blend secular and sectarian education.* * * *" (Emphasis supplied.)

In *McGowan* v. *Maryland,* 366 U. S. 420, 443 (1961), and *Torcaso* v. *Watkins,* 367 U. S. 488, 493 (1961), the Court again, in each case, repeated the statement, made in the *Everson* and *McCollum* cases, that "*No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*" (Emphasis supplied.)

In *Engel* v. *Vitale,* 370 U. S. 421, 431 (1962), the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. (Emphasis supplied.) The Court (at 436) quoted from Madison's *Memorial and Remonstrance* that "* * * the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

This was the state of the law before *Schempp.* In every Establishment case between *Everson* and *Schempp,* except *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94 (1952) (where it was not even remotely relevant), the Court reiterated the *Everson* principle that government may not

finance or subsidize institutions that teach or practice religion. The court below, however, apparently took the position that all this had been implicitly repudiated in *Schempp* and was superseded by a new test announced in that case. In considering the validity of the assumption, we suggest that particularly pertinent is the following statement by the greatest of Chief Justices in his opinion in *United States* v. *Burr*, 4 Cranch 470, 482 (1807):

> [A]n opinion which is to overrule all former precedents and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. * * * General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect * * * (4 Cranch 470, 482 (1807).)

In *Schempp*, the Court declared unconstitutional the practice of devotional Bible reading and prayer recitation in public schools. In its opinion, the Court, in referring to the constitutionality of the permissive statute, said:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion. (373 U. S. at 222.)

There is, we submit, nothing in *Schempp* or in any subsequent decision of this Court to support the assumption that the *Everson* principle that government may not finance

institutions engaged in the practice or propagation of religion has been repudiated or abandoned. Certainly, nothing in the *Schempp* opinion suggests anything even remotely justifying such an assumption. Indeed, in *Schempp* the Court cited *Everson in support of the Schempp test.* The justification for the assumption lies, if anywhere, not in *Schempp* but in *Allen.* There the Court upheld the constitutionality of a New York statute providing for the loan of secular textbooks to children attending nonpublic schools, including parochial schools. Applying the test set forth in *Schempp,* the Court held that it could not assume that either the purpose or primary effect of the statute was to advance religion.

But *Allen* hardly supports an assumption that the *Everson* test was repudiated. In *Allen,* the Court not only cited *Everson* but quoted the critical phrase from the classic paragraph that the First Amendment bars any "tax in any amount, large or small * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." (392 U. S. at 242.) Quoting a principle with approval, we suggest, is hardly an effective way of repudiating it.

In *Allen,* the Court held, as it had held in *Everson,* that where a state undertakes a secular program for the benefit of children, the program is not constitutionally impermissible merely because as an incidental by-product thereof religious educational institutions might benefit. That is a far cry from saying that government may finance the institution by paying its teachers' salaries. This the Court made clear in the following language:

> • • • The law merely makes available to all children the benefit of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution. (392 U. S. at 243-244. Emphasis added.)

As if to underline the critical distinction between aiding children and their parents on one hand and financing the institutions' operations, the Court stated:

> It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their children. There is some evidence that at least some of the schools did not; intervenor defendants [parents of children attending parochial schools] asserted that they had previously purchased all their children's textbooks. * * * (*ibid.*).

Thus, *Allen,* unlike the present case, presents no instance of governmental financing relieving the sectarian school of an expenditure which it otherwise would have made.

On the same day that *Allen* was decided, the Court decided *Flast* v. *Cohen,* 392 U. S. 83 (1968), which, we believe, supports our conclusion. The gravamen of the complaint in that case was that Federal funds appropriated under the Elementary and Secondary Education Act of 1965 were being used as in the present case, to finance instruction in reading, arithmetic and other secular subjects

in religious schools and to purchase textbooks and other instructional materials for use in such schools, all in violation of the Establishment Clause of the First Amendment. The Government moved to dismiss the suit on the ground that the plaintiffs, as mere taxpayers, had no standing to challenge judicially an expenditure of Federal funds.

While the Court specifically stated that it was not passing on the merits of the particular case since there was nothing before it but the complaint, it upheld the plaintiffs' standing to sue. It did so on the ground that the complaint did allege a facially sufficient claim under the First Amendment's Establishment Clause. Such a holding could not have been made if governmental financing of the so-called secular aspects of sectarian schooling did not raise a constitutional issue under the First Amendment. Were such financing not inconsistent with the Establishment Clause, the plaintiffs' challenge would simply be to an expenditure for the general welfare, a challenge which the Court held could not, under *Frothingham* v. *Mellon,* 262 U. S. 447 (1923), be made by a taxpayer.

That the Court deemed subsidization of institutions that teach or propagate religion violative of the Establishment Clause is clear from the following (392 U. S. at 103-104):

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First

Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, §8.

Nothing in *Walz*, the latest Establishment case, indicates an intent to repudiate or abandon the *Everson* principle barring the subsidization of institutions that teach or practice religion. True enough, the Court commented on the "hazards of placing too much weight on a few words or phrases" and illustrated this hazard by reference to the words in the paragraph in *Everson* quoted above which state that government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." (90 S. Ct. at 1412.) But the Court in upholding the tax exemptability of religious institutions made it quite clear that it was not sanctioning governmental subsidization of such institutions. The whole tenor of the decision reflects a constitutional distinction between subsidy and exemption and an avoidance of anything that might be construed to impair the vitality of the basic *Everson* principle. Thus, the Court emphasized that

> The grant of tax exemption is not sponsorship since *the government does not transfer part of its revenue to churches* but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries or hospitals into arms of the state or *employees "on the public payroll."* There is no genuine nexus between tax exemption and the establishment of religion. (90 S. Ct. at 1415. Emphasis added.)

In the present case, of course, the state government does transfer part of its revenue to churches and does in fact place the employees of the church schools "on the public payroll," for that indeed is the sole purpose of the statute here challenged.

Again, the Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an *indirect* economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. *In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.* The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church or government led to

the kind of involvement we seek to avoid. (Emphasis added.)

In *Everson* the Court articulated a principle going back to the time of the birth of the Republic, namely that government may not subsidize institutions that propagate or practice religion. Nothing the Court has done or said since then manifests any intent to retreat from that principle. Applying that principle to the present case requires a determination that the judgment of the court below was clearly erroneous.

4. The *Schempp* Test

If the majority of the court below was correct in its assumption that the *Everson* test has been superseded by *Schempp,* then it would seem even more clear that the *Schempp* test has been superseded by *Walz.* After all, the *Schempp* Court expressly relied on *Everson* for its test whereas the *Walz* Court did not cite *Schempp* even in a footnote. On the contrary, the Court in *Walz* studiously avoided application of the *Schempp* test. While it noted that the "legislative purpose of a property tax exemption is neither the advancement nor inhibition of religion" (90 S. Ct. at 1413), the second half of the test it applied was stated not in terms of advancement or inhibition (as in *Schempp*) but of "entanglement" (*id.* at p. 1414).

We do not urge that *Walz* has superseded *Schempp* for the same reason that we believe *Schempp* did not supersede *Everson.* All three tests express in differing phraseology a principle which has been part of American history from its beginning as a nation, the principle that tax-raised

funds may not be used to support institutions that practice or propagate religion.

Assuming, however, that we are incorrect on both scores, and that *Schempp* promulgated a new and different test which was not superseded by *Walz*, we submit, nevertheless, that the majority of the court below was in error in dismissing the complaint and that at the very least the plaintiffs should have been allowed to establish by a trial of the facts that the purpose or the primary effect of the statute was to advance religion.

The majority of the court below refused to explore into the actual purpose of the statute. While it said that the "legislative findings of the State are not to be lightly set aside" (A92), it actually held that they may not even be inquired into. We have indicated above why we believe this to be erroneous. Here we add only that if this were to be a universal rule, *Brown* v. *Board of Education*, 347 U. S. 483 (1954) would be a dead letter. See *Adickes* v. *S. H. Kress & Co.*, *supra* (separate opinion of Mr. Justice Brennan). It is no answer that *Brown* dealt with racial segregation whereas the present case does not (or at least no longer does so in view of the lower court's holding that none of the plaintiffs have standing to raise the issue, A87). The First and Fourteenth Amendments are part of the same Constitution; the prohibition against governmental subsidization of religion is no less constitutionally mandated than that against racial segregation. Nor does the Constitution authorize different standards of judicial scrutiny into legislative purpose for different regions of the country; the Pennsylvania legislature is neither more nor

less immune from judicial scrutiny than that of Mississippi. In any event, in *McGowan* and in *Epperson* this Court held applicable to Establishment cases the principle of judicial scrutiny into legislative purpose rejected by the court below. In the former the court expressly stated (366 U. S. at 453):

> • • • We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, *in conjunction with its legislative history,* or in its operative effect—is to use the State's coercive power to aid religion. (Emphasis added.)

Whatever justification the court below may have had for foreclosing inquiry into the purpose of the statute we can see none for its refusal to allow the plaintiffs to establish that its effect is to advance religion. The *Schempp* test speaks in alternatives; if either the purpose or the primary effect is to advance religion, the statute is unconstitutional. A legislature can perhaps decree purpose; but even Parliament cannot decree effect.

We submit that the Pennsylvania statute if not on its face at least as applied must have the effect of advancing religion. As we have indicated, it is our contention that the *Everson* and *Schempp* tests are not inconsistent but in fact say the same thing in different ways. That which aids religion advances it and the effect of aid to religion is obviously to advance it. This conclusion is not negated by the fact that the *Schempp* decision, in stating the test, uses the word "primary". Indeed, the source from which the *Schempp* Court took the purpose and effect test, *McGowan*

v. *Maryland,* did not use the word "primary." There the Court said:

> After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation. (366 U. S. at 449.)

What the word primary means is that the aid to religion is a direct consequence rather than an incidental by-product of the governmental action. It means that governmental pursuit of a secular goal is not constitutionally impermissible because as an indirect consequence thereof religion may be advanced, just as it would not be impermissible merely because as an indirect consequence religion may be inhibited. In the complex world we live in and the vast range of governmental activities, very few if any private institutions, religious as well as secular, are not in some way affected by governmental action, either to their advantage or disadvantage.

This, as the Court noted in *Walz,* is what the *Everson* decision means. It is also what *McGowan,* which together with *Everson* was the source of the *Schempp* test, means. In *McGowan* the Court upheld constitutionality of Sunday closing laws on the ground that notwithstanding their religious origin, their purpose and effect today was not to aid religion but to provide a common day of rest, relaxation and family togetherness. Obviously, as the Court pointed out, if persons may not open their stores on Sunday some of them at least may go to church and to that extent religion is aided. But equally obviously such aid was no

more than an incidental by-product or indirect consequence of the governmental action.

This Court noted in *Walz* that no religious body that maintains schools would deny that an affirmative if not dominant policy of church schools is to assure future adherents to a particular faith by having control of their total education at an early age (90 S. Ct. at 1412-1413). We cannot see how subsidization of such schools, even if the funds are earmarked for secular subjects, can be held not to have a primary or dominant effect of advancing the particular religion which maintains the schools. This was recognized by Judge Hastie, who in his dissent in the court below, said (A103-104):

> It is unrealistic to view the present statute as merely subsidizing secular instruction and thus only incidentally benefiting religious institutions by releasing their funds for religious purposes. The primary purpose for which sectarian schools formulate and offer a comprehensive curriculum apart from the public school system is religious. Through a total educational program offered in a separate religious environment, sectarian schools serve to inculcate and reinforce in children doctrine and moral precepts derived from the tenets of the church. It is not necessary to inquire whether, for the fulfillment of this primary religious purpose every course is taught with religious overtones. The crucial consideration is that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives. When the state reimburses a sectarian school for any part of the curricular costs of such a teaching program it directly finances and supports a religious enterprise. Constitutionally, such subsidizing of a religious enterprise is not essentially

different from a payment of public funds into the treasury of a church. Such a prohibited involvement of the state in a religious undertaking is not validated merely because the religious enterprise itself incidentally relieves the state of the cost of educating many children.

The same basic point was made by the Supreme Court of Maine in invalidating a similar statute, as follows:

> Fundamentally it cannot be gainsaid that the sectarian school exists for the purpose of adding an additional dimension, to wit, advancement of the faith, to the secular education which it supplies. If the parents sought only the secular education, such is available to them as a matter of right in the public school system. Sectarian school education is selected for its religious atmosphere and teaching.
>
> Budgets for the secular instruction may be technically separable from the budget of the entire operation of the school, but the institution is an inseparable whole, which is strengthened in its institutional purpose when it is strengthened in any of its departments by outside financial assistance. See *Schempp,* supra, p. 1575. Economics is not the controlling factor in determining the validity or invalidity of L. D. 1751. The Constitution is the controlling factor. The school administrative units accomplish nothing under this Act that they could not reasonably accomplish within the public school systems and without benefit to sectarian schools.
>
> Applying the *Schempp* test, the purpose and primary effect of L. D. 1751 is to subsidize those sectarian schools, the closing of which would cast an increased student burden on the public school system as measured under Section 3804. Such subsidization by its assuring the continuance of the school, assures the continuance of the purpose for which the school exists, —advancement of the faith it represents. The net result of all of this is for the State to invade the sectarian

school system in a manner which violates the independence to which it is constitutionally entitled. The result is not the neutrality required by the Constitution.

The most recent judicial consideration of the constitutionality of a statute such as the one challenged herein is the case of *DiCenso* v. *Robinson,* decided by the United States District Court for Rhode Island on June 15, 1970. The court unanimously held the statute unconstitutional, the majority (Circuit Judge Coffin and District Court Judge Bownes) on the ground that it violated both the *Schempp* and the *Walz* tests, the minority (District Court Judge Pettine) on the ground that it violated the *Walz* test. Judge Coffin's opinion is a carefully considered analysis which we commend in its entirety to this Court's attention. In his opinion Judge Coffin said:

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "the primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.
>
> Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activ-

> ities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (?)] proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities. * * *

In a footnote Judge Coffin added:

> Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. * * *

We submit, therefore, that under the *Schempp* test, no less than under *Everson*, the decision of the majority below was erroneous.

5. The *Walz* Test

In his dissenting opinion in the court below, Judge Hastie stated:

> Mr. Justice Goldberg, in *Abington* v. *Schempp*, 374 U. S. 203, 248 and Mr. Justice Harlan, in *Board of Education* v. *Allen*, 392 U. S. 236, 249, have both ex-

pressed what I believe to be a sound rationalization that the First Amendment is violated by state action which will "involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude." I am unable to avoid the conclusion that the state undertaking authorized by Act No. 109 would thus intolerably involve the state in the realm of the sectarian.

In this respect Judge Hastie anticipated this Court's decision in *Walz*. If the purpose of a law, the Court held in *Walz*, is to advance or support religion it is unconstitutional. But even if that is not its purpose. the law is still unconstitutional if its end result or effect is "an excessive government entanglement with religion." (90 S. Ct. at 1414). Tax exemption for churches was upheld because it involved less entanglement than would the removal of exemption. But exemption, the Court held, was constitutionally different from subsidy because the latter does involve entanglement. The Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The

> hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.

The statute here challenged does "encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." The Act (section 5) imposes upon the State Superintendent of Public Instruction the responsibility for administering the statutory program. It defines "secular subject" whose teaching is subsidized to exclude "any subject matter expressing religious teaching, or morals or forms of worship of any sect." (Section 3).

This provision is of course necessary, for the teaching of secular subjects permeated with religion could not constitutionally be subsidized by the state as *McCollum* and *Allen* make clear. But in seeking to avoid the Scylla of sectarianism the statutory plan is necessarily engulfed in the Charybdis of entanglement. There is simply no way of avoiding the former danger but by "sustained and detailed administrative relationships" or, to put it in other words, by continued surveillance and policing.

It is no answer that the same "sustained and administrative relationships" are required in respect to public schools and that they too must be policed lest evangelistic teachers bootleg sectarianism into biology or history. The critical difference lies in the fact that the First Amendment does not forbid "sustained and detailed administrative re-

lationships'' between a secular government and a secular school system, but it does forbid them between a secular government and a religious school system.

Both the majority and the minority in *DiCenso* v. *Robinson* agreed that a statute such as the one challenged herein cannot avoid unconstitutionality under the no-entanglement test of *Walz*. Because the court's opinion in that case is so cogent, we take the liberty of setting forth here the following rather lengthy extract:

> When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions involved in *Walz*, must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of ''secular'' education such as Rhode Island already provides its public schools.
>
> On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the

loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suitable for public school use. *Compare* R. I. Gen. Laws §16-1-9 (Supp. 1967). Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This on-going administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U. S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen*, 392 U. S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman*, 310 F. Supp. at 52, private conduct which is heavily subsidized by the

state may be viewed as state action and subjected to the same standards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *cf. Evans* v. *Newton*, 382 U. S. 296 (1966).

Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957), and in the hiring and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969). At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment. *Accord, Opinion of the Justices*, 261 A.2d 58 (Me. Jan. 15, 1970).

Although entanglement is the major test of *Walz* and its application requires reversal of the decision of the court below, there is another, perhaps subsidiary test in *Walz* which leads to the same conclusion, namely the test of practical construction.

In *Walz* both the Court's opinion by the Chief Justice (90 S. Ct. at 1415) and the concurring opinion of Mr. Justice Brennan (at 1418) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New*

York Trust Co. v. *Eisner*, 256 U. S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in exactly the opposite direction. From the disestablishment of churches at the end of the 18th and the beginning of the 19th centuries until the enactment of the statute challenged herein neither the Federal government nor any state has directly subsidized the operations of parochial schools. Just as the constitution or laws of every state in the Union authorize tax exemption so do they universally forbid direct subsidization. See Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941); *Horace Mann League* v. *Board of Public Works*, 242 Md. 645 (1966).

We know of no case in court in the United States, Federal or state, in which a law providing for payment of tax-raised funds to a church to subsidize its parochial school operations has been upheld as constitutional. There have been a number of cases wherein parochial schools, experiencing the financial difficulties faced by the parochial schools in the present case, were purportedly transferred to the public school system under a plan whereby the parochial school premises were rented to the public school authorities and the teachers, usually nuns and sisters, were employed *en masse* by them as public school teachers. With but one exception,[10] the arrangement was held unconstitu-

10. *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940).

tional in every case,[11] and even in the exceptional case constitutionality was based on a factual finding that the school was no longer a parochial school but had in fact become incorporated into the public school system even though the nuns turned over their public school salary checks to the religious order to which they belonged.

The plan envisaged in the present statute is merely a variation of these efforts and, we submit, equally unconstitutional.

Conclusion

Whether measured by the *Everson* test, the *Schempp* test or the *Walz* test the statute challenged herein cannot be upheld as constitutional in all cases and in all circumstances. We believe it is unconstitutional on its face, but at the very least it is unconstitutional if applied to authorize payment to sectarian institutions which are controlled by churches or religious organizations, have as their purpose the teaching, propagation and promotion of a particular religious faith, and conduct their operations to fulfill that purpose. Accordingly the decision of the court below is erroneous and should be reversed.

Respectfully submitted,

LEO PFEFFER
Attorney for Amici Curiae

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11. The cases are cited and discussed in Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941); L. Pfeffer, *Church, State and Freedom* 537-554 (Rev. ed., 1967).

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In The

Supreme Court of the United States

October Term, 1969

No. [redacted] 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,
Plaintiffs-Appellants

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,
Defendants-Appellees

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor Defendant-Appellee

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES, KURTZMAN AND SLOAN

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QUESTIONS PRESENTED

Where the State of Pennsylvania enacted a statute authorizing state purchases of secular education services from qualified nonpublic schools, irrespective of whether they are sectarian institutions:

(1) Was the three-judge District Court below correct in finding that the statute on its face and in the necessary effect of its administration does not violate the establishment clause or free exercise clause of the First Amendment?

(2) In view of the failure of the appellants to establish the proper standing, was the three-judge District Court below correct in refusing to consider conjectural allegations that the statute might be applied so as to violate the equal protection clause of the Fourteenth Amendment?

(3) Was the three-judge District Court below correct in granting Defendants' Motion to Dismiss in accordance with Rule 12(B)(6) of the Federal Rules of Civil Procedure because plaintiffs failed to state a claim upon which relief could be granted?

STATEMENT OF THE CASE

The Nonpublic Elementary and Secondary Education Act (Act No. 109 of 1968) was enacted to promote the welfare of the people of the Commonwealth of Pennsylvania and to promote the secular education of children attending nonpublic schools.[1] By its legislative findings, the act emphasizes the overwhelming and compelling necessity for state governmental support of the purely secular educational services provided by nonpublic schools.[2] Unquestionably, this act accomplishes its stated purpose to reduce the hazard to the education of Pennsylvania children which would be occasioned by the increased financial burden to the Commonwealth if a majority of parents of the present nonpublic school population were to remove their children to the public schools of the Commonwealth.

The act authorizes the Superintendent of Public Instruction to contract with qualified nonpublic schools for the purchase of "secular educational services."[3] The act does not provide for subsidies; rather, the Commonwealth makes payments from a

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[1] Act of June 19, 1968, P. L. , (Act No. 109), 24 Purdon's Pennsylvania Statutes Annotated 5601 et seq. (pocket part).

[2] 24 P.S. §5602(6).

[3] "A nonpublic school," is defined to mean a school other than a public school, wherein a resident of Pennsylvania may legally fulfill the requirements of the Pennsylvania Compulsory Attendance Law, 24 P.S. §5603(4).

special fund in fulfillment of its contractual obligation in exchange for services rendered to it by the contracting nonpublic schools.

The act prescribes and establishes strict limitations upon the types of secular educational services which it authorizes to be purchased:

> (1) The purchase of secular educational services is limited to the actual cost of teachers' salaries, textbooks and instructional materials in the four subjects of mathematics, modern foreign languages, physical science and physical education;
>
> (2) The act specifically prohibits the use of any public funds for the instruction of any subject matter expressing religious teaching or the morals or forms of worship of any sect.[4]

To insure the high standard and secular nature of these educational services, the act grants to the Superintendent of Public Instruction supervisory powers to maintain a satisfactory level of student performance and teacher certification in the four secular subjects.

On June 3, 1969, appellants filed their Complaint together with a Motion for Preliminary Injunction and a Motion for the convening of a three-judge court. They contend that the act violates the establishment clause of the First Amendment on the ground that receipt of public funds by sectarian institutions for any purpose is unconstitutional and that

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[4] Act of June 19, 1968, P. L. , 24 P.S. §5603(3).

the use of public funds for nonsectarian purposes unavoidably advances sectarian training.

The Complaint further alleges that the act on its face and as applied prohibits the free exercise of religion in that it constitutes compulsory taxation for the support of religion.

The appellants further allege that the act on its face and as it might be applied violates the Fourteenth Amendment in that it constitutes a denial of the equal protection of the laws by authorizing the use of public funds which might encourage discrimination. The appellees moved to dismiss the Complaint for failure to state a claim and for lack of standing.

On November 28, 1969, the court granted defendants' Motion to Dismiss the Complaint for failure of all plaintiffs to state a claim upon which relief can be granted. The Court found that the organizational plaintiffs lacked standing on all issues. As to the individual plaintiffs, the court found that only plaintiff Lemon had established standing to raise the First Amendment issue and that no individual plaintiff had standing to raise the Fourteenth Amendment issue.

The court did not reach its decision in a vacuum. On the contrary, all parties submitted extensive briefs on the issue of standing and on the merits of the case. Additionally, the court heard considerable and comprehensive oral argument on every issue. The District Court properly accepted as true all well-pleaded allegations of fact in the plaintiffs' complaint. Being a three-judge District Court convened pursuant to 28 U.S.C. 2284, the court considered only whether the act violated the First or Fourteenth Amendments as

a matter of law based upon facial constitutionality and not upon possible maladministration of the act. In so doing, the court found *Board of Education v. Allen*, 392 U.S. 236 (1968) to be decisive on the First Amendment issue. Applying the *Allen* test of purpose and primary effect, the court held that the purchase of secular educational services by nonpublic schools (which is the purpose and primary effect of this act) is a constitutional exercise of Pennsylvania's governmental duty to provide an efficient school system. It concluded that the act's purpose of promoting the welfare of the people of the Commonwealth of Pennsylvania and the secular education of children attending nonpublic schools had been constitutionally approved in *Allen* (App. A90, A91, A98). Further it found that the statute has been drafted with sufficient safeguards to insure that the authorized public funds would be expended only for secular purposes. It emphasized that the act on its face authorizes the payment of funds for services connected solely with the strictly secular subjects of mathematics, physical science, modern foreign languages and physical education. (App. A94, A95). The court particularly noted the express fiscal and quality controls in the act which support the defendants' contention that it maintains a position of complete religious neutrality.

The court specifically held that receipt of public funds by the nonpublic schools themselves rather than by the children or their parents is constitutionally irrelevant in view of the fact that the children, like those in *Allen*, are the ultimate beneficiaries of the statute (App. A97).

Having held that the Pennsylvania Nonpublic Elementary and Secondary Education Act did not violate the establishment clause of the First Amendment in any respect and that it did not support religion in any way, the court summarily dismissed plaintiffs' allegation that the act contravenes the free exercise clause of the First Amendment (App. A98, A99).

No plaintiff, including plaintiff Lemon, has alleged that he was personally affected by any intentional discrimination or de facto segregation or that he had attempted to enroll his child at any of these schools and was denied admission because of race or religion (App. A87). Consequently, there was no basis for the court below to consider the plaintiffs' contention that the act infringed upon their Fourteenth Amendment rights for the simple reason that no plaintiff satisfied the essential elements of standing to raise that issue. In finding the lack of standing the court placed great reliance upon, and quoted extensively from, this Court's opinion in *Flast v. Cohen*, 392 U.S. 83 (1968).

Judge Hastie, in his dissenting opinion, agreed with the majority that no plaintiff had established the requisite standing necessary to raise the Fourteenth Amendment issue. However, he would have denied the defendants' Motion to Dismiss as to plaintiff Lemon on the ground that the statute violates the establishment clause of the First Amendment. Judge Hastie was of the opinion that the primary purpose and effect of the act is religious. He held that the Pennsylvania Act, unlike the New York Act in *Allen*,

invites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions (App. A104).

SUMMARY OF ARGUMENT

The Pennsylvania Nonpublic Elementary and Secondary Education Act authorizes the Commonwealth of Pennsylvania to purchase secular educational services from qualified nonpublic schools, irrespective of whether they are sectarian. The court below found, as a matter of law, that the act provides adequate safeguards to prevent an establishment of religion. The court properly restricted its inquiry to the face of the statute in determining whether its purpose and primary effect is to involve the Commonwealth in the business of religion.

The Pennsylvania Act conforms in all respects with the neutrality doctrine as defined by *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Walz v. Tax Commissioner of City of New York*, 25 L. Ed. 2d 697 (1970). Further, the purpose and primary effect of the act is secular, neither advancing nor inhibiting religion. In fact, the statute specifically fulfills the requirement of *benevolent* neutrality as defined in *Walz* by equalizing the benefits of secular education for public and nonpublic schoolchildren.

The relationship created by the act between parochial schools and the Commonwealth is not one of interdependency; rather, it is one of purchase and sale of secular educational services.

This Court's opinion in *Allen*, supra, is decisive of the First Amendment issues raised in this case. The

New York statute therein upheld had the same purpose of equalizing state benefits among all its schoolchildren by irrevocably committing funds to provide secular educational services by nonpublic schools. The underlying premise in *Allen* applies equally to the instant case. That is, nonpublic schools, even if religiously oriented, perform a secular function which is, and must be kept, separate and apart from religious teaching.

The regulations by which Pennsylvania mandates that the educational services provided to nonpublic schools will be secular are substantially similar to those in *Allen*. In fact, by expressly prohibiting the use of any public funds for religious instruction or forms of worship of any sect, the Pennsylvania statute more effectively accomplishes that purpose.

The court below properly placed great reliance upon the legislative findings in the act which demonstrate the overwhelming and compelling necessity for state governmental support of the purely secular educational services provided by nonpublic schools.

Contrary to the arguments made by appellants, the government may employ religious agencies as the vehicle to accomplish a secular purpose provided that there are sufficient fiscal and quality controls so that no public funds are expended for the advancement of religion. The extensive controls in the Pennsylvania Act make it plain that, as a matter of law, there is no "blending" of the secular with the religious.

The fact that the nonpublic schools are the payees under the act is of no constitutional significance.

ARGUMENT

I. The Pennsylvania Act Which Authorizes State Purchases of Secular Educational Services From Qualified Schools, Irrespective of Whether They Are Sectarian Institutions, Does Not Violate the Establishment Clause of the First Amendment as a Matter of Law

It cannot be seriously disputed that the establishment clause of the First Amendment prohibits the states from setting up a church or supporting the religious activities of sectarian institutions. On the other hand, it has been conclusively determined that a state may not exclude persons, on account of their religion, from the benefits of public welfare legislation and must be neutral in its relations with groups of religious believers and nonbelievers. *Everson v. Board of Education,* 330 U.S. 1 (1947). In *Everson,* the Court upheld a New Jersey statute which authorized reimbursement to parents for the expense incurred in busing children attending both public and parochial schools. Mr. Justice Black, speaking for the Court in *Everson,* analogized busing to other necessary governmental services provided to parochial schools, such as fire and police protection, public highways and sidewalks. Thus, "state power is no more to be used so as to handicap religions than it is to favor them." *Everson,* supra at 18.

The Court has consistently upheld state legislation in which governmental responsibilities were general-

ly performed although religious schools derived some incidental benefits. In *Cochran v. Board of Education,* 281 U.S. 370 (1930),[5] a Louisiana statute which allowed state money to be used to purchase secular textbooks for all pupils in the state was upheld. Although the decision of the Court in *Cochran* was based on the Fourteenth rather than the First Amendment, the approach taken by the Court in that case is indicative of what was to be its philosophy on the establishment issue. Mr. Chief Justice Hughes speaking for the Court in *Cochran* said at page 375:

> "Its [the Louisiana statute's] interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded."

The doctrine of constitutional neutrality formulated in *Everson* was also applied and clarified in *Abington School District v. Schempp,* 374 U.S. 203 (1963).[6] Mr. Justice Clark characterized the *Everson* test as follows:

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[5] *Bradfield v. Roberts,* 175 U.S. 291 (1899) had earlier raised the question of the validity of an appropriation to a sectarian institution for secular purposes; however, the Court decided the case on the basis of the nonreligious nature of the corporation operating the institution.

[6] Counsel for appellants correctly points out that the purpose and primary effect test had its genesis in *McGowan v. Maryland,* 366 U.S. 420, 453 (1961): "We do not hold that Sunday legislation may not be a violation of the 'Establishment Clause' if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the state's coercive power to aid religion." (Brief for Appellants at p. 23).

> What are the *purpose and primary effect* of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose and a primary effect* that neither advances nor inhibits religion. *Schempp*, supra at 222: See also *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). (Emphasis supplied.)

In its most recent pronouncement concerning the establishment clause, the Court held that a New York law granting property tax exemption to religious organizations for land owned by them and used solely for religious purposes did not violate the establishment clause. *Walz v. Tax Commission of City of New York*, 25 L. Ed. 2d 697 (1970). In discussing the present state of the law, Mr. Chief Justice Burger made clear that the concept of neutrality in this area is not absolute and that therefore each statute must be carefully examined to determine whether the doctrine of neutrality has been violated. "The problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). See *McGowan v. Maryland*, 366 U.S. 420 (1961). However, one general principle serves as the guideline for interpretation:

> "* * * we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benev-*

> *olent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Walz*, supra at 702. (Emphasis supplied.)

It is highly significant that the *Walz* opinion supplements the previously-described neutrality doctrine in a dramatic way. As set forth above, the neutrality required of a state in the First Amendment area is now described as "*benevolent* neutrality." This same benevolence was present, but not specifically expressed, in *Everson*, supra and *Board of Education v. Allen*, 392 U.S. 236 (1968). The purpose and effect of the statutes in those cases was to equalize the benefits of public welfare legislation so that all students, whether in public or nonpublic schools, would be treated equally. The Pennsylvania act has accomplished precisely the same objective within properly regulated and defined limits. That is, each student in primary or secondary school (assuming that the school meets the quality standards established in the act) is now entitled to the same benefits of a quality secular education. Hence, this act is designed, and in fact accomplishes, the same result as the constitutionally-approved statutes in *Everson* and *Allen*.

As Mr. Chief Justice Burger recognized in *Walz*, the loan of textbooks in *Allen* logically must be considered an "aid" because it relieved the participating religious schools in New York of a substantial financial burden. Nevertheless, the Court applied the establishment clause in the same "sensible and realistic" fashion as Justice Black had done in *Everson*. It did not "construe the religion clause with a literal-

ness that would undermine the ultimate constitutional objective as illustrated by history." *Walz*, supra at 703. Rather, it looked to the primary effect of the act and concluded that such effect was manifestly secular.

It has been suggested that the extensive governmental safeguards present in the Pennsylvania act which insure that all public monies will be spent only for secular purposes make the act unconstitutional under the "excessive entanglement" doctrine of *Walz*. The Court enunciated that doctrine in the following language:

> "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. * * * [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz*, supra at 704, 705.

In the context of this case, as in *Allen*, it would be absurd to hold that the inclusion of specific safeguards in the act, as those are further limited by regulation, make the statute unconstitutional. On the contrary, those very safeguards make this act *constitutional* by guaranteeing that the secular is totally segregated from the religious.[7]

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[7] This same argument that such safeguards infect an otherwise constitutional act was recently approved by the United

The holding in *Walz* is in conformity with previous decisions of this Court. In *Zorach v. Clauson,* supra, the Court recognized that:

> "We are a religious people whose institutions presuppose a Supreme Being. . . . We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . *When the state encourages religious instruction . . . it follows the best of our traditions.* For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach,* supra at 313-314; *Walz,* supra at 703. (Emphasis supplied.)

The *Walz* opinion indicates that religion is an important element in our society. Therefore the Court's concern should not be whether religion has been incidentally aided. On the contrary, the test is whether there has been an establishment of religion to such

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States District Court for Rhode Island in *DiCenso v. Robinson* (decided June 15, 1970). That court declared unconstitutional a Rhode Island statute which had authorized payments of public funds to teachers of secular subjects in nonpublic schools. In doing so, it ignored the now well-accepted "purpose and primary effect" test of *Schempp* and *Allen* by assuming that this Court had abrogated that test in *Walz.* However, a plain reading of *Walz* yields precisely the opposite conclusion. As stated above, *Walz* approved the *Allen* decision despite the fact that the New York program was an "aid" to the sponsoring churches. Thus, the type of "excessive entanglement" discussed in *Walz* was not present in the statute in *Allen* although New York extensively regulated the relationship between church and state. The defendants submit that the Pennsylvania Act, like the New York Act in *Allen,* does not create that type of entanglement.

a degree that religion becomes the state's business. "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." *Zorach,* supra at 312.

Counsel for the appellants states in his Brief:

> "The defenders of the Act maintain that the result of the Act is to create a cooperate working arrangement between the Commonwealth of Pennsylvania and the parochial school system under which the parochial school system takes on a portion of the duty mandated in the Pennsylvania Constitution to maintain a public school system and, in turn, the State, *pro tanto,* supports the parochial system." (Brief for Appellants at p. 40).

It cannot be denied that this act creates a contractual relationship between the participating schools and the Commonwealth of Pennsylvania. However, this is not the type of day-to-day relationship which Mr. Justice Burger discussed in *Walz,* supra at 704 (Brief for Appellants at pgs. 42, 43). Such a relationship was not contemplated and certainly is not essential to the operation of the Pennsylvania Education Act. The relationship created is simply one of purchase and sale of secular educational services. On the one hand, the Commonwealth of Pennsylvania receives quality secular education; on the other, the contracting schools receive the necessary funds to provide that quality secular education.

The *effect* of the statute is the uppermost consideration. If that effect is to create an excessive government entanglement with religion, then the statute

must fall. However, as in this case, if its effect is to promote a secular purpose, then the statute conforms with the dictates of the First Amendment as enumerated in the decided cases and must be upheld.

Appellees submit that a state does not violate the doctrine of governmental neutrality when it uses public funds to equalize the general benefit to all of its citizens and to better insure receipt of quality secular education. Cf. *Rhoades v. Abington Twp. Sch. Dist.*, 226 A. 2d 53, 424 Pa. 202 (1967), appeal dismissed for want of a substantial federal question, 389 U.S. 11 (1967). In *Rhoades*, the Pennsylvania Supreme Court upheld the constitutionality of a statute which required school boards to provide free bus transportation to pupils attending nonpublic, nonprofit elementary and high schools if such provisions were also made for public school students. The Pennsylvania Court relied heavily upon *Everson* in holding that the act did not promote the establishment of religion or prevent the free exercise of religion. In doing so, it emphasized the purely secular nature of the statute which carefully differentiated between secular and religious aid.

The decision of this Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), is decisive of the First Amendment issues raised in this case. In *Allen*, the Court applied the neutrality doctrine and upheld the constitutionality of a New York statute which required the State to lend textbooks free of charge to all children in private sectarian and nonsectarian schools. The "purpose" there was to improve educational opportunities in the area of secular education:

> "The express purpose of §701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge." *Allen*, supra at 243.

The appellants repeatedly urged the court below to examine the legislative history of the statute in order to ascertain the "true intent" of the Legislature in the enactment of this statute. The District Court refused to make such an examination on the ground that the statute was clear on its face and that the intent of the Legislature, if that intent must be considered, is to be found in the legislative findings contained within the act (App. A92). The determination of the lower court on this point was proper in view of the long-standing principle that, absent some ambiguity, a court should only consider the express language of a statute. There is no necessity nor any justification for a detailed examination of the legislative history surrounding the Pennsylvania Education Act for the reason that the statute, in terms of its purpose and primary effect, is so clearly expressed. Accordingly, the District Court correctly followed the approach taken in *Allen* by limiting its inquiry to the legislative findings in the statute.

The Pennsylvania Legislature met the constitutional criteria of purpose and primary effect in its statement of purpose in Section 2 of Act No. 109. It found, and declared, that an education crisis exists in

the Nation and in the Commonwealth because of new emphasis on educational excellence and the increased cost thereof, that the state must find resources to further these advances, that the state can and must enter into contracts for needed educational services with persons or institutions, public or nonpublic, sectarian or nonsectarian, to fulfill its duties.

The validity of this legislative judgment was recognized by the Court in *Allen*:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the Court decisions, has been a recognition that private education has played a significant and valuable role in raising national levels of knowledge, competence, and experience. * * * [p]arochial schools are performing, in addition to their sectarian function, the task of secular education." *Allen*, supra at 247, 248.

The legislative findings contained within the Pennsylvania statutes are "not to be lightly set aside, and must be treated as conclusive of the existence of the facts recited in the absence of strong evidence to the contrary." *William Laubach & Sons v. City of Easton*, 32 A. 2d 881, 347 Pa. 542, 547 (1943) [citations omitted]. The court below recognized the importance of legislative findings and relied upon the following language of Mr. Justice Frankfurter:

> "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this Court from the beginning lend no support whatever to

> the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' McCray v. United States, 195 U.S. 27, 56. 'Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts.' " [Citations omitted.] *McGowan v. Maryland,* 366 U.S. at 496 (App. A92, A93).

A court is not justified in attributing improper motives to a coordinate branch of State Government as the basis for invalidating a state statute.

The principle established in *Allen* is of critical importance here. A comparison of the Pennsylvania Public Education Act with the statute in *Allen* convincingly demonstrates that the purpose and effect of both acts are substantially similar. In *Allen,* this Court held that a New York statute authorizing loans of textbooks to students attending parochial schools was not violative of the establishment clause of the First Amendment. Although public funds are also irrevocably committed to parochial schools and other nonpublic schools pursuant to the Pennsylvania Education Act, expenditures under the act serve the same secular purpose as those in *Allen* by providing textbooks, teachers' salaries and instructional materials in the secular subjects of mathematics, physical sciences, modern foreign languages, and physical education. The significant fact in both cases is that public funds are being used solely for the purpose of providing *secular* education services to nonpublic schools.

The underlying premise in *Allen* was that nonpublic schools, even if religiously oriented, perform a secular purpose which is separate and apart from religious teaching. It follows that a state may constitutionally rely upon this distinct function in satisfying its duty of providing education. It has been long recognized that religious schools pursue two goals, religious instruction and secular education. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

A further premise in *Allen* was that a religiously-affiliated school can keep these two functions separate:

> "* * * we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Allen,* supra at 248.

The Court recognized that textbooks might differ from bus transportation in a constitutional sense if public funds were expended to provide *religious* books for New York school children. However, the Court found that only secular books could be loaned under the New York act, and consequently rejected the appellant's contention that the loan of textbooks inevitably advances the teaching of religion.[8]

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[8] The Court recently further clarified the concept of separation in the context of the establishment clause: "Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of

The fact that a purchase-reimbursement method is used rather than a loan method is a distinction without a difference, and is of no constitutional significance. As Chief Justice Hughes said in *Cochran v. Board of Education*, supra at page 375:

> "The Court [below] also stated, although the point is not of importance in relation to the federal question, that it was 'only the use of the books that is granted to the children, or, in other words, the books are lent to them."

Similarly, the purchase of the services of the teachers instructing the students in these secular courses provides no more than the medium through which the textbook knowledge is imparted to the student. These services perform the same secular function in the nonpublic or private school as they do in the public school.

The appellants argue that the District Court erroneously applied this Court's "purpose and primary effect" test by only considering facial constitutionality and the necessary effect of the statute's administration (App. A88, A89). In so doing, the court below classified as a conclusion of law the allegation that the purpose and primary effect of this act is to aid religion. In view of the striking similarity between the statute in *Allen* and the Pennsylvania act, the court justifiably found it unnecessary to permit discovery and testimony on the establishment issue. At best, the Appellants could have demonstrated only that the administration

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religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries. . . ." *Walz*, supra at 705.

of the act by the seven defendant schools (out of a possible twelve hundred contracting schools) violated the establishment clause. In the interest of judicial economy, such questions of application should be left to a single district judge rather than the three-judge panel convened here to decide the facial constitutionality of this act. Accordingly, the court below properly viewed the petitioners' allegation of unconstitutionality as a conclusion of law which need not be deemed admitted for the purpose of testing the sufficiency of the complaint on a motion to dismiss.

The foregoing discussion should convincingly demonstrate to this Court that the Pennsylvania act conforms with the neutrality doctrine set forth in *Everson*, *Allen* and *Walz*. It extends to nonpublic school children the same general state benefits enjoyed by other children and furthers the State's interest in secular education, without regard to religious belief. The fact that the *vehicle* through which the state provides these benefits might foster religion in other areas is irrelevant so long as that advancement of religion is not accomplished with public funds. In short, the crucial consideration is not *from whom* the educational services are purchased; rather, it is what type of services are purchases and who receives the benefits thereof.

Counsel for the appellants asserts that the wall of separation between church and state is so well defined that, as a general principle, a religious school cannot participate in the advancement of a secular purpose. In support thereof, counsel cites a quotation from the concurring opinion of Mr. Justice Brennan

in *Schempp*, supra to the effect that government may only employ religious means to serve secular interests if it can clearly be demonstrated that nonreligious means will not suffice. (Brief for Appellants at p. 39). That kind of broadside argument completely ignores prior decisions of this Court permitting religious schools to carry out the secular function of education. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court unanimously held that parents of children in Oregon could constitutionally fulfill their statutory obligation of compulsory education by sending their children to parochial schools. There was no doubt in *Pierce* that the secular purpose of compulsory education was achieved through the vehicle of a religious school. Certainly we are not now rearguing the well-settled principles enunciated in *Pierce*.[9] The *Pierce* doctrine

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[9] *Pierce* is not the only case to permit the fulfillment of minimum educational requirements in parochial schools. The Court in *Allen* at n. 7 cited *Pierce* and its progeny with approval:

> "'* * * This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.' *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (citing *Pierce v. Society of Sisters*). A great many state cases have upheld a wide range of private school regulation. E.g., *Meyerkorth v. State*, 173 Neb. 889, 115 N.W. 2d 585 (1962), appeal dismissed for want of a substantial federal question, 372 U.S. 705 (1963); *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (1929); *People v. Donner*, 199 Misc. 643, 99 N.Y.S. 2d 830 (Dom. Rel. Ct. 1950), aff'd men., 278 App. Div. 705, 103 N.Y.S.

adequately refutes counsel's broadly based generalization that religious means can never be used to accomplish secular ends.

The wall of separation between church and state as defined by this Court has not been breached by this Act. It is significant that the method used in the Nonpublic Elementary and Secondary Education Act to extend these benefits insures that only the *actual costs* of the authorized secular education service will be paid to the private schools. As in *Everson,* the actual cost of performance is payable only *after* the service is performed satisfactorily. Accordingly, this method is not a direct grant or subsidy to religious institutions which might be applied to some unauthorized use. This purchase of services method prevents the use of state funds for the expansion of facilities or for any other use that could premanently improve the institution. Further, payment for the textbooks and instructional materials used by the nonpublic schools can be made only if they are approved by the Superintendent of Public Instruction as appropriate for use in the four secular courses delineated in the Act. These safeguards provide even more assurance than did the New York Act in *Allen* that Pennsylvania will remain wholly neutral and will take no official action regarding the establishment of religion.

Unlike the New York Act, the Pennsylvania statute expressly prohibits the use of any public funds for the instruction of any subject matter expressing religious

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2d 757, aff'd mem., 302 N.Y. 857, 100 N.E. 2d 48, appeal dismissed for want of a substantial federal question, 342 U.S. 884 (1951)."

teachings or the morals or forms of worship of any sect. Pennsylvania Nonpublic Elementary and Secondary Education Act, §3(3) (App. A20). The New York Act permitted boards of education to designate textbooks to be loaned without expressly providing that public funds should not be used to supply books of a religious nature. *Allen*, supra at 239, 240.

The appellants repeatedly maintain that a state may not have any semblance of a working realtionship with a religious school. To do so, they contend, would *ipso facto* be a law "respecting the establishment of religion." Such an argument runs directly counter to the Court's decision in *Allen*. The New York Act extensively regulated the attendance and curriculum of New York private schools. New York Education Law, §§3201-3229 (1953). In fact, the underlying principle of the New York Education Law was that the instruction to be given in private schools satisfying the compulsory attendance law be "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." New York Education Law, §3204, subd. 2; *Allen*, supra at n. 7. The *Allen* opinion makes clear that each state may regulate the minimum hours of instruction, the qualifications of teachers and the quality of the subject matter of instruction in nonpublic schools. Thus, especially in view of *Pierce v. Society of Sisters*, supra, it can readily be seen that each state "has a proper interest in the manner in which [private schools] perform their secular educational function." *Allen*, supra at 247.

In view of the strict quality controls present in the New York Act, the Court recognized that a state may establish a working relationship with religious schools without necessarily violating the establishment clause. There is no constitutional reason why the state cannot only regulate, not only prescribe, but in fact *insure* the furtherance of its interest by purchasing quality education.

The fact that the nonpublic schools are the payees under the Act is similarly of no constitutional significance. This Court has never held that the funds must actually be paid to the student or his parents. As the court below correctly noted:

> "The child and society generally certainly benefit from the improvement of the secular education the child received regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers." *Lemon et al. v. Kurtzman et al.*, 310 F. Supp. 35, 47-48 (E.D. Pa. 1969) (App. A97).

Constitutional differences should not be resolved upon the basis of such technicalities. The *Allen* opinion implicity recognized this when it upheld the constitutionality of the New York statute despite the fact that parochial schools ordered and stored the textbooks before furnishing them to the students. *Allen*, supra at 244, n. 6.

The court below also held this not to be a case where "State tax-supported public school buildings, facilities and teachers are used as a forum for the dissemination of religious doctrines at times and on occasions when pupils are subject to the State's com-

pulsory attendance laws." *Lemon et al. v. Kurtzman et al.*, supra at 47 (App. A95, A96). (Citing *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Abington School District v. Schempp*, supra; *Engel v. Vitale*, 370 U.S. 421 (1962)). The common factor in *McCollum, Vitale* and *Schempp* was the state's intent, either expressly or by tacit consent, to involve itself in the business of *religion.*

In sharp contrast, secular education in America has been and is the state's business—an interest deemed by the Commonwealth to be critical to its existence. The Constitution of Pennsylvania gives witness:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Article III, Section 14.[10]

The Pennsylvania Legislature observed in Act No. 109 that almost one-fourth of the school age population in Pennsylvania attends nonpublic schools. The secular education of these citizens is no less critical to the Commonwealth's interest and purpose.

It is therefore apparent that the Pennsylvania Nonpublic Elementary and Secondary Education Act has

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[10] In footnote 5 of their Brief, appellants argue that one of the effects of the Pennsylvania Act is to convert the contracting nonpublic schools into public schools. They further contend that the *Schempp* case requires that all such schools eliminate religious ceremonies and observances. The fallacy of appellant's contention is plain. As in *Allen*, the participating schools are merely the *vehicles* through which secular education services are provided.

been meticulously drafted so as to comply with those decisions of this Court which have sustained similar statutes authorizing the use of public funds to support the secular functions of sectarian schools. The test of purpose and primary effect has been met. The purpose of the act is the secular education of children—a valid state interest, and its primary effect is neither to advance nor inhibit religion, but rather to strengthen the quality of secular education.

II. The Pennsylvania Act Which Authorizes State Purchases of Secular Educational Services From Qualified Schools, Irrespective of Whether They Are Sectarian Institutions, Does Not Violate the Free Exercise Clause of the First Amendment as a Matter of Law

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Having decided that the purpose and primary effect of the Act is secular and does not advance or support religion, the court below necessarily held that the plaintiff's challenge based upon the free exercise clause of the First Amendment was without substance. As a matter of law, the plaintiffs have failed to show "the coercive effect of the enactment as it operates against them in the practice of their religion." See *Abington School District v. Schempp,* supra, at 223 (1963).

As the court below specifically noted in its opinion, the appellants did not allege in what manner they were coerced in the practice of their religion. Their pleadings are silent as to what particular religious beliefs are affected by this act. Accordingly, as a

matter of law, the appellants' constitutional challenge based upon the free exercise clause must fail for the reason that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Schempp,* supra at 223.

In short, the plaintiffs have not demonstrated that this act in any way affects them in the exercise of any religious or devotional activity in any nonpublic school.

III. The Organizational Appellants Have No Standing To Maintain This Action Under the First or Fourteenth Amendments

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The appellants are (1) individuals who are citizens and taxpayers of the Commonwealth of Pennsylvania and (2) organizations situated in Pennsylvania. The organizational appellants allegedly are associations which "share as a common objective the separation of Church and State and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect exclude or otherwise discriminate against persons by reason of race or religion" (App. A9). The court below found that these organizational appellants lacked standing to maintain this suit under the religious clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment.

The authority of *Flast v. Cohen,* 392 U.S. 83 (1968), is relied upon by all parties to this litigation.

In *Flast,* Mr. Chief Justice Warren defined the specific elements necessary for standing. Under that formulation it is indispensable that the plaintiff allege that he has:

> ". . . a *personal stake* in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962); *Flast,* supra at 101; see *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 151 (1951) (concurring opinion of Frankfurter, J.). (Emphasis supplied.)

In addition, *Flast* requires each plaintiff to demonstrate some adverse legal interest which he is seeking to protect.

It is apparent on the face of the Complaint that these organizational appellants do not meet the requisite elements of standing made essential by *Flast.* Initially, there is no allegation that these organizations are taxpayers. Furthermore, the appellants do not allege that they have suffered any specific injury. Clearly, each of these organizations is as free of injury now as it was before the act was enacted. At best, their role in this lawsuit is one of *amicus curiae.* In fact, they are in the same category as the plaintiffs in *Doremus v. Board of Education,* 342 U.S. 429, 431 (1952), where the Court stated:

> "Apparently the sole purpose and the only function of plaintiffs is that they shall assume the

role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute."[11]

In their attempt to prove standing, these appellants rely upon the novel theory of the "Private Attorney General" advanced by Professor Louis L. Jaffe of Harvard Law School. See 'Standing to Secure Judicial Review: Private Actions" 75 Harv. L. Rev. 255 (1961). This theory is based principally upon the interest which an organization allegedly has in a particular public issue and not upon any specific injury which the organization might have suffered. While this theory may have some pedagogical appeal, it is directly contrary to the opinions of this Court on the subject of standing. To repeat, *Flast v. Cohen* requires nothing less than a personal stake in the outcome of the controversy. Moreover, *Flast* demands a showing of two further essential elements:

(1) The taxpayer must establish a logical link between the status asserted and the type of legislative enactment attacked; *and*

(2) The taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. *Flast*, supra at 101, 102.

On the basis of the pleadings in which the appellants fail to allege a logical nexus between the status

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[11] These organizational appellants are not indispensable parties for the maintenance of this action. Appellant Lemon has already demonstrated the requisite standing to challenge this statute on the basis of the religious clauses of the First Amendment.

asserted and the claim sought to be adjudicated, the court below properly concluded that these appellants have failed to establish standing as to both the religious and equal protection issues.

IV. Only Appellant Lemon Has Standing To Attack This Statute on First Amendment Grounds

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The three individual appellants allege that they are taxpayers of the Commonwealth of Pennsylvania and therefore possess the requisite stake in the outcome of this litigation required by *Flast v. Cohen.* Additionally, appellant Lemon alleges that he paid an admission fee to a Pennsylvania harness track, which fee included the tax source of the funds expended under this Act. The court below held that all three individual appellants had standing to maintain this action on First Amendment grounds.

As stated, the statute in question creates a Nonpublic Elementary and Secondary Education Fund which is financed solely from taxes and fees imposed upon horse racing in the Commonwealth of Pennsylvania. In order to demonstrate "the necessary stake as taxpayers" in the outcome of this litigation to satisfy Article III requirements, these individual appellants must, at the very least, allege that they have contributed to the special fund which is the sole source of funds under this act. Appellant Lemon is the only individual who has so contributed and therefore is the only appellant who is qualified to raise the First Amendment issue.

Relying upon *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Torcaso v. Watkins*, 367 U.S. 488 (1961), the court below held that the other two individual appellants, although they have not alleged the payment of any tax which would bring them within the class of affected taxpayers, also possess the requisite standing to raise the First Amendment issues. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she refused to work on Saturday, the Sabbath Day of her religion. Thereafter, the appellant sought unemployment compensation benefits under the South Carolina Unemployment Compensation Act, but was denied those benefits because she had "failed, without good cause, to accept 'suitable work. . . .'" *Sherbert*, supra at 401. The Court found that the denial of benefits infringed upon her constitutional rights under the free exercise clause of the First Amendment because of the inevitable pressure placed upon her to forego the practice of her religion. In *Torcaso*, an athiest who met all other requirements for the office of Notary Public in Maryland, refused to subscribe to the religious oath required of all such office-holders. The Court held that the Maryland Religious test could not be enforced against the plaintiff because it invaded his freedom of belief. *Torcaso*, supra at 496.

The holdings of *Sherbert* and *Torcaso* are inapposite here. The majority opinion of the court below assumed that the individual plaintiffs other than Lemon refrained from attending horse races so that they would not contribute to the teaching of religion. However, as Chief Judge Hastie correctly noted in his dissenting opinion below:

> ". . . the complaint contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues to the purposes of Act No. 109, and none of the individual plaintiffs has alleged any particular religious belief or any effect of Act No. 109 on the practice of a particular religion." *Lemon,* supra at 54 (App. A110).

Further, there is no merit to the theoretical argument that *all* taxpayers are affected by this Act on the ground that the revenues generated by harness racing could have been applied for some general use. Such a broad contention is not sufficient to establish standing. Again, the case of *Flast v. Cohen* is dispositive. Mr. Chief Justice Warren spoke of an "affected class" in describing the application of the "nexus" tests in *Flast:*

> "[where a challenged tax affects] . . . a particular class of taxpayers . . . the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers *within the affected class." Flast,* supra at 104 n. 25. (Emphasis supplied.)

In his dissenting opinion below, Chief Justice Hastie noted the foregoing language of *Flast* and added:

> "In order to have 'the requisite personal stake in the outcome,' the plaintiffs should have an established monetary interest in the relief sought, rather than an interest that will be realized only if judicial action enjoining expenditures supported by a particular tax program to which plaintiffs

are not subject shall result in a decrease in general tax burdens." *Lemon*, supra at 54 (App. A110, A111) (dissenting opinion of Hastie, C. J.). (Citation omitted.)

In the light of the decisions of Your Honorable Court, the individual appellants other than Lemon do not have standing to raise a First Amendment challenge to this statute. A contrary holding would destroy the precise limitations placed on the standing of taxpayers in *Flast* and would permit *any* taxpayer to bring suit to challenge *any* public expenditure.

V. No Appellant Has Standing To Challenge This Statute on Fourteenth Amendment Grounds

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The court below unanimously held that no organizational or individual appellant had standing to challenge this act on Fourteenth Amendment grounds. These appellants generally alleged that the contracting schools under the act intentionally discriminate in the selection of students. It was further alleged that de facto racial segregation exists in the appellee schools, and under the statute would be perpetuated and supported by public funds.

On its face, the Complaint fails to meet the standing requirements enumerated in *Flast*. No appellant alleged the requisite "personal stake in the outcome of the controversy" sufficient to permit him to bring suit. The two-fold burden in *Flast* prevents any of

these petitioners from raising the equal protection argument. It is to be emphasized that *Flast* requires every taxpayer to establish a logical link between the status asserted and the type of legislative enactment attacked *and* a nexus between that status and the precise nature of the constitutional infringement alleged.

Petitioner Lemon has alleged that he is a Negro whose child attends a public school in Pennsylvania. However, as the court below noted:

> ". . . There is no allegation in the complaint which asserts that Lemon's child attempted to enroll at any [contracting school] and was denied admission because of race or religion. * * * Race is indeed a relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies or laws *where he himself was not the object of such practice.* See e.g. *Burton v. Wilmington Parking Authority,* 365 U.S. 716 (1961); *Simkins v. Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (4th Cir. 1963) cert. denied 376 U.S. 938 (1964); *Deal v. Cincinnati Board of Ed.,* 369 F. 2d 55 (6th Cir.) cert. denied 389 U.S. 847 (1966) . . ." *Lemon,* supra at 41, 42 n. 14 (App. A87, A88).

VI. The Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment as a Matter of Law

The court below unanimously held that no plaintiff had standing to raise the equal portection issue. Even if this Court were to consider the Fourteenth Amendment issue, the pleadings compel the conclusion that this statute on its face does not violate the equal protection clause.

It is fundamental that every state statute carries with it a presumption of constitutionality. *United States v. National Dairy Produce Corp.*, 372 U.S. 29, 32 (1963); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 354 (1936) (Concurring opinion of Brandeis, J.); *Fleming v. Nestor*, 363 U.S. 603, 617 (1960); *United States v. Harriss*, 347 U.S. 612, 618 (1954). Moreover, it must be assumed that the Commonwealth grounded its law on some rational basis within the knowledge and experience of legislators, even though some discrimination could eventually flow from the maladministration thereof. *Metropolitan Casualty Insurance Co. of New York v. Brownell*, 394 U.S. 580 (1935). Thus, "state legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it". *McGowen v. Maryland*, 366 U.S. 420, 425 (1960). It is further to be presumed that the public officials charged with administering a state statute are acting properly and

applying the law in a constitutional manner. *United States v. Chemical Foundation*, 272 U.S. 1 (1926).

A reading of this statute demonstrates that the Pennsylvania Legislature has acted within strict constitutional limitations. There is no basis for even an inference that, as a matter of law, the act excludes from admission or otherwise discriminates against persons by reason of race. By adding the Fourteenth Amendment issue to the First Amendment challenge, the appellants are asking the Court to speculate that the act might some day produce some form of discrimination. But the basic issue for adjudication is not whether the act might be administered in an unconstitutional manner because the possibility or probability of such maladministration cannot nullify a statute. Otherwise, no statute could ever withstand a constitutional challenge on equal protection grounds.

Such speculative consequences were not even considered by the three-judge District Court below. The proper disposition of such conjectural allegations with respect to a specific case is by remand to a single-judge District Court. The existence of an appellant who has standing to raise the equal protection issue would not justify the Court in basing an adjudication upon a finding that the act might be administered in an unconstitutional fashion.

CONCLUSION

Appellees respectfully submit that every issue raised by the appellants in this appeal was properly decided by the three-judge District Court below.

Accordingly, the judgment entered by the United States District Court for the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,
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AUG 10
E. ROBERT SEAVER

In the Supreme Court of The United States

No. 89 October Term, 1970

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNYSLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

vs.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF THE SCHOOL DISTRICT OF THE CITY OF SCRANTON, *Lackawanna County, Pennsylvania, Amicus Curiae, as Sponsored by the District Solicitor, James A. Kelly, Esq.*

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INTEREST OF THE *AMICUS*

The School District of the City of Scranton, the Amicus herein, is a body corporate quasi-municipal corporation and a political subdivision of the Commonwealth of Pennsylvania, statutorily ordained as a school district of the second class to carry out the Pennsylvania constitutional mandate for public education, which by law serves public and private school students, in the City of Scranton, its boundaries being contiguous to the said school districts, all of whose powers and duties may be found in the *Public School Code of* 1949, *March* 10, *P.L.* 30, *Art. I, Section* 101, *et seq.*, as amended. 24 *P.S.* 1-101, *et seq.*

The Public School Code of 1949 requires compulsory education, with few exceptions, for all children between the ages of eight and seventeen years in a day school or by tutor, not necessarily in a recognized public school. Therefore, the fulfillment of these statutory requirements may be secured in a private or non-public school, provided the curriculum conforms to standards of the Pennsylvania Department of Education; thus is encouraged private and/or non-public schools, which no one doubts exist in substantial proportion to the recognized public school system in this Commonwealth. *Act of* 1949, *March* 10, *P.L.* 30, *Art. XIII, Sec.* 1326 *through* 1333, 24 *P.S.* 13-1326 *through* 13-1333.

In accordance with Rule 42 (4), this brief is filed and sponsored by the Solicitor of the School District of the City of Scranton, as the authorized law officer for the said political subdivision. *U.S. Sup. Ct. Rule* 42 (4), 28 *U.S.C.*

The authority granted and interest in this case of the Board of Directors of the School District of the City of Scranton may be found in *Resolution to File of Solicitor No.* 12, 1970, *attached as Advisory A.*

ARGUMENT

1. HISTORICAL PERSPECTIVE

Under the American form of federalism, the people reside in and are citizens of not only the United States but also of the states in which they dwell. The powers of government have been distributed by the Constitution between the national and the states governments. The tenth amendment to our Constitution reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Since the Constitution does not delegate to the nation general authority over the field of education, its supervision and control is reserved to the states. Nevertheless, the states' control over education is not exclusive. It is shared with the parents. This principle has been acknowledged by this Court in *Pierce v. Society of Sisters*, 268 *U.S.* 510, 535 (1925):

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Most political philosophers agree that the state or its government should not attempt to do for its people what the people can do, and do perhaps better, for themselves. Ordinarily, the primary objective or aim of a state should be the creation of an orderly state of affairs in which the people can develop themselves to the highest degree—physically, intellectually and morally. Because parents do not have either the ability or the time to give their children a proper and adequate education, and because the state requires an intelligent citizenry in our country, the government of the fifty states, acting in the name and authority of the parents and of the

federal constitution, offer facilities for education to their children.

From the earliest times in American history, the states have shared their educational function with private organizations—denominational and nondenominational. The earliest schools were in fact private, not public. As our educational system has expanded, private and non-public schools have worked side by side with public institutions to provide training—elementary to graduate level—for Americans. Their combined efforts have been remarkably successful. This sharing of a state function has not been restricted to the field of education.

In many states, transportation and utilities have been furnished by private companies or corporations, as well as by public agencies. No one is shocked or surprised when the state grants these private organizations subsidies to assist them in performing a public function. In similar manner, since the private school is assisting the state in performing its educational function, the school is doing a public service and might appropriately be subsidized in doing it.

Other nations in the world have recognized this public service character of private and non-public schools and have found means of providing subsidies for them. Our own national government, speaking through this Court, has acknowledged and approved the public service function of the private school. Various states in the Union have also recognized it and have found means to assist materially in its implementation. In *Everson v. Board of Education*, 330 U.S. 1, 7 (1947), this Court sustained parents who were reimbursed by the state for bus expenditures in getting their children to and from school. Mr. Justice Black, speaking for this Court, said:

Argument

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose.

Accordingly, non-public schools serve the public welfare and perform a public function.

The City of Scranton, County of Lackawanna and Commonwealth of Pennsylvania, in fact most of Northeastern Pennsylvania, now benefit from widespread non-public school systems, the foremost of which in the environs of the Scranton School System is the Scranton Diocese Roman Catholic Parochial School System.

This system is sponsored by the Bishop of Scranton, governed by a school board of lay and clerics and staffed by various orders of religious whose numbers are diminishing to that extent whereby lay teachers are equal to or outnumber those teachers who also are members of a religious order. *See Advisory B from Reverend Monsignor William L. Donovan, Superintendent of Scranton's Diocesan Schools.*

Although a large scale non-public school system exists here, this was not always the case. Rather this system was allowed to grow and grow from its humble beginnings in 1860 when the Immaculate Heart Sisters, who at the time "tilled the soil of Northeastern Pennsylvania alone", organized St. Alphonsus (Laurel Hill) Academy, Susquehanna, Susquehanna County, Pennsylvania. From then until now this non-public system attained monumental proportions in service to a great segment of the tax-paying public. A Century of History, The Diocese of Scranton, 1868-1968. Rev. John P. Gallagher, Ph.D. Library of Congress. Catalog Card No.: 68-56284.

This great school system has finally reached its economic and personnel breaking point by the closure of its first school, "Laurel Hill", in June of 1970. While it is a fact that other

such institutions have been required to close, this can be avoided, to the benefit of the tax-paying public and the sanity of public school staffs, only if a means such as *Act* 109, *the Pennsylvania Non-Public Elementary and Secondary Education Act of* 1968, *June* 19, 24 *Purdon Statutes* 5602, *et seq.*, is approved by this Court.

Although it is not possible to completely cover the parallel and complementary growth of the traditional public and private school systems still operating in the City of Scranton, it is interesting to note that they began their growth in earnest at about the same time and under similar circumstances. For instance, a bound report to be found in the Office of the Superintendent of Schools for Scranton titled: "Report of the Board of School Directors (1915)" tells us this:

> "In its early history Scranton contained four separate and independent school districts; the first district comprised the First, Second and a part of the Thirteenth wards; the second district, the Third and Twenty-first wards; the third district, the Fourth, Fifth, Sixth, Fourteenth, Fifteenth and Eighteenth wards; the fourth district comprised the Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth wards.
>
> As the city grew in size and importance the disadvantages of this system became more and more apparent. The requisite Act of Assembly having been passed in 1874, the necessary preliminary steps were taken, and April 30, 1877, the four districts were consolidated into the present City of Scranton School District."

In like fashion, "A Century of History," supra, reveals these facts:

> "Up to the end of its first decade of existence, the Scranton Province (Immaculate Heart of Mary Sisters) had to be most selective as to where and when its slender

resources, in terms of personnel, would be used. If the community was to grow, it had to have the widest possible access to the vocation potential of northeastern Pennsylvania. For reasons of logic, therefore, choice locations were given priority over parochial needs as such. It was a wise policy and it served the purpose of recruitment well. With the novitiate at Carbondale, its site since 1876, constantly expanding, the Immaculate Heart Sisters were able to turn their attention at last to the specific and pressing challenges of the lower Lackawanna valley. Four schools, one after another, were established in Scranton and a fifth in nearby Olyphant within the next ten-year period. In the order of their founding, they included Holy Rosary, Providence, in 1882; St. Patrick's, Hyde Park, 1885; St. John the Evangelist's, South Side, 1887; St. Paul's, Green Ridge, and St. Patrick's, for the mid-valley area, 1892."

Parenthetically, but to highlight the need for support from Act 109 to the non-public sector as a means of lessening the economic and practical crisis that could occur in the public school sector let us report additional closings from the above opening list, to wit: Holy Rosary, St. Paul's and St. Patrick's as secondary schools and St. John the Evangelist as an elementary school. These were all closed after 1967 to the current date.

2. BUDGET, TAXES AND SCHOOL OFFICIALS

There is no other way of proving increased costs, greater teacher-pupil load, a strain or impossible conditions upon facilities other than through blunt words and hard facts and figures.

Without a record to rely upon, we submit to the Court certain advisories and schedules essentially for these purposes:

1. To relate the professional judgment of *Scranton's Chief School Administrator, Mr. Eugene M. Langan, See Advisory C.*

2. To determine budgetary and tax consequences from 1960 through 1969, *see Schedule I*, and for the years 1970 through 1978, *see Schedule II*, as furnished by the *District Secretary, Mr. Thomas W. Hogan.*

3. To realize the formidable task of Scranton taxpayers and their elected officials had there been or should there be a diminution or complete closure of the Non-Public School System, even in steps of 25 per cent, 50 per cent, or in the extreme of 100 per cent, *see Mr. Hogan's Schedules III* (1960 through 1969) *and IV* (1970 through 1978). Moreover, *see Secretary Hogan's Schedule V*, which sets forth a comparative cost analysis of actual building costs and financing through 1969, and projected building costs only, without considering the present high cost of financing, for those years from 1970 through 1978.

Accordingly, any clear thinking person given only a minimum of business acumen would, barring a clear case of constitutional prohibition, judge in favor of the theory and result achieved by Act 109 and against calamitous impairment in the education of our youth and/or the tax burden upon all adults, particularly those of family and/or without adequate income.

Argument

3.SPECIFIC TAXES FOR COMPULSORY EDUCATION

From a review of Schedules I, II, and III, infra, this Court can easily satisfy itself, if it cannot do so from its own experience, that the cost of education has spiralled. To take, and scan, Schedule I, infra, for sheer comparison of the cost of education in Scranton for the past decade is simply breath-taking.

As an example of how the cost of public education is shared, the taxpayers of the Scranton School District bear at least 50 per cent of the burden and the Commonwealth of Pennsylvania usually less.

In 1963 a financial crisis arose in Pennsylvania essentially because of legitimate teacher demands for more salary. To meet these demands, which were made to the Pennsylvania General Assembly as well as to the local school board, the legislature reacted by adopting the (six per cent) "Tax Act of 1963 for Education," 1956, *March* 6, *P.L.* (1955) 1228, *Art. I, Sec.* 1, 1963, *May* 29, *P.L.* 49, *Sec.* 2, 72 *P.S.* 3403-1.

This 1963 amendment to the "Selective Sales and Use Tax Act of 1956," supra, was the first step in earmarking a major source of revenue directly to public education and in support of the services rendered by teachers to children in all school districts of the Commonwealth

In Pennsylvania it takes more than a six per cent sales tax and other general state revenue to support the public school systems throughout the Commonwealth. Indeed, as you will see from schedules I through V, infra, that it takes at least 50 per cent from local Scranton taxpayers.

It has been a substantial number of these local taxpayers who have for all these years prior to Act 109, supra, sustained a dual school system, public and non-public, in this a

pluralistic society. It is the supporters of private education, also public school taxpayers, who bear their full share of the six per cent "Tax Act of 1963 for Education."

Hence, it should come as no surprise that the time came to earmark public funds for non-public secular education, or to reiterate Mr. Justice Black's common sense approach from Everson, supra:

> It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose.

Accordingly, "*it is much too late*" in Pennsylvania to believe that the defeat of Act 109, supra, will not be devastating to the six per cent Tax Act for Education, the real estate taxpayer, the wage and property taxpayers, the per capita taxpayer, and so on, not to mention our present public school system and those children in our non-public schools who deserve an opportunity "*to get a secular education,*" which surely serves many "*public purposes*" (italics ours).

Argument

4. NON-PUBLIC SCHOOLS AS PUBLIC EMPLOYER

A broadened America is now old enough and Americans sufficiently sophisticated to see things as they are. It is a truism that we can know nothing of the present, without knowing the past from which the present has come.

It is my humble opinion that all the strife that has gone into church-state debate and the attempted legal restructuring of God in His relationship to man is a sin.

We truly believe that in Pennsylvania at least the General Assembly has wisely dealt with the secular affairs of men and left their devotion, or lack of it, to themselves. On the other hand, the Pennsylvania General Assembly has not been gun-shy when called upon to restructure the rights of men, even though these rights might be exercised in what the opponents to Act 109, supra, argue is non-secular because it is a parochial or private non-public school.

As Amicus Curiae, we urge that if Act 109, supra, is fully non-secular, then *Act 195, July 23, 1970, fully effective Oct. 21, 1970* or the *"Public Employe Relations Act"* is an intrusion by the state into the sectarian affairs of the church, which would surely be unconstitutional.

It is not difficult to see how the General Assembly in its desire to give economic relief to non-public schools through Act 109, supra, felt that these institutions were entitled to support for their students in the secular areas delineated by the Act. The same General Assembly had this consensus when in the *"Public Employe Relations Act"* it defined a public employer, thusly:

> "Public employer" means the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commsson, agency, auth-

ority, or other instrumentality thereof AND ANY NONPROFIT ORGANIZATION OR INSTITUTION AND ANY CHARITABLE, RELIGIOUS, SCIENTIFIC, LITERARY, RECREATIONAL, HEALTH, EDUCATIONAL OR WELFARE INSTITUTION RECEIVING GRANTS OR APPROPRIATIONS FROM LOCAL STATE OR FEDERAL GOVERNMENTS but shall not include employers covered or presently subject to coverage under the act of June 1, 1937 (*P.L.* 1168), as amended, known as the "*Pennsylvania Labor Relations Act*," the act of July 5, 1935, *Public Law* 198, 74*th Congress*, as amended, known as the "*National Labor Relations Act.*"

Wherefore, we urge that if a non-public school affiliated with a sectarian denomination must bargain collectively with its employes, who are people, as required by said Act 195, then how can such an institution be considered so "churchy" that it must be deprived of public support in its endeavor to educate children who are also people. Moreover, a non-public school, which is now required to "collectively bargain" with its employes had better have collateral sources for economic support as from Act 109, or else.

CONCLUSION

Finally, we pray this Court to sustain the decision of the District Court Panel by this non-secular language of Act 109, to wit:

> "(6) That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools."

SURELY THE LEGALITY OF ACT 109 IS NOT BEYOND THE JURIDICAL WIT OF MAN

JAMES A. KELLY
Attorney for Amicus Curiae
Office of the Solicitor
300 Scranton Life Building
Scranton, Pennsylvania 18503

Advisories

ADVISORY A

RESOLUTION
TO FILE OF SOLICITOR NO. 12, 1970

RE: AMICUS CURIAE BRIEF IN SUPPORT OF PENNSYLVANIA NON-PUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT, 1968, JUNE 19, ACT NO. 109, 24 PURDON STATUTES 5602, ET SEQ.

WHEREAS, the General Assembly of the Commonwealth of Pennsylvania adopted Act 109 (P.N.E.S.E.A.) thereby providing public support to the education of non-public school children, which support has been funded and was funded from tax sources created at or about the time of the Act, none of which diverted normal tax revenue from the public to the private sector; and

WHEREAS, the Philadelphia School Board recognizing the need and urgency for the continuation of a non-public school system running parallel and complementary to the public school system as a means of lessening the urban crisis and tax impact that has and shall continue to occur by virtue of the closure and diminution of non-public schools; and

WHEREAS, the Scranton School Board, being concerned with all education in the School District of the City of Scranton, has naturally and conscientiously reached a similar conclusion relative to the crises occurring in Philadelphia and other large and small school districts across the Commonwealth; and

WHEREAS, the Scranton School Board recognizes that to ignore that which the Philadelphia School Board has officially and openly admitted would be a contradiction to certain known social and economic facts now already existent in the Scranton School District; and

Advisory A

WHEREAS, to ignore the real and substantial benefits derived by school systems in the public sector from said Act 109 would be to create a basis upon which the taxpayers of the School District of the City of Scranton would almost immediately sustain greater wage and real estate tax burdens; and

WHEREAS, the District Solicitor, James A. Kelly, Esq., upon consultation with the Scranton School Board has advised of the legal efficiency of Act 109 and has recommended to the Board of Directors that he be authorized and directed to join as counsel, amicus curiae, with Robert Landis, Esq., of the Philadelphia firm of Dechert, Price & Rhoades, or to file a separate Amicus Curiae Brief on behalf of this School District, in the case of Lemon v. Kurtzman, et al, in the Supreme Court of the United States, October Term, 1970, No. 89, thereby in support of the official position of David H. Kurtzman, Secretary of the Commonwealth of Pennsylvania, the Pennsylvania General Assembly and the School District of the City of Philadelphia, among others.

NOW, THEREFORE, BE IT RESOLVED, that District Solicitor, James A. Kelly, Esq., is hereby authorized and directed to carry out the tenor and effect of the within Resolution.

Action: All eight members present voted yea, Directors Alfred M. Sporer, Joseph C. Muskett, Eugene F. Hickey, Vincent S. Yuskiewicz, Dorothy M. Kairis, William J. Murray, Walter Gantz and Wallace J. Cullen; Donald B. Cahoon, Esq., was not present and did not vote.

ADOPTED THIS 3rd DAY OF AUGUST, 1970.

CERTIFIED FROM THE RECORDS OF THOMAS W. HOGAN, DISTRICT SECRETARY.

s/ THOMAS W. HOGAN

ADVISORY B

August 6, 1970

Mr. James A. Kelly
Solicitor
School District of Scranton
300 Scranton Life Building
Scranton, Pennsylvania 18503

Dear Mr. Kelly:

In connection with your sponsorship of an Amicus Curiae Brief on behalf of the Board of Directors of the School District of Scranton, I would like to offer the following rationale that, there is a national need, a public interest, in the plurality of educational choices. Certainly no child ought to be subjected to value inculcations which encounter his parents' conscience, or the family's cultural needs or traditions.

In our American society we have a tension between the melting pot demands and the demands of individuality. The public interest lies midway between these two poles. Unity, we are now finding out, lies as little in educational monopoly, as it does in educational atomization. The realization of the *public* interest lies in totally fostering public education for all those *who want* it, but the public interest does not stop there. The realization of the public interest lies also in partially fostering nonpublic education. In a now heavily welfare-oriented society in which massive governmental expenditure is dominant, and in which individual men and women, who when banded together in associations or institutions, have not the economic resources with which to maintain diverse, non-state endeavours, this role of "State-enabler" serves human liberty and thus a vital public interest.

Advisory B

Here in the city of Scranton our two systems have a ways been complementary and parallel to each other throug the years. Our public schools have provided and are provid ing the best quality education they can. The nonpubli schools have also provided and are providing the best qualit education they can for its 5,686 children. We have until re cently managed to subsidize, at a great sacrifice, our systen of schools with the voluntary contributions of the faithful The dedicated religious teachers, once our solitary boast, are now diminishing in numbers. They must of necessity be re placed by lay teachers. The voluntary contributions of our people just cannot meet the just and reasonable salary de mands of the lay teacher. Yet without the aid of these lay teachers our system would collapse.

It must be patent to the esteemed members of your School Board and to all thinking persons that the nonpublic school system is currently in a real crisis. It just cannot sub sidize any longer the education of 5,686 pupils with volun tary contributions, nor can we count on the total services of the religious teachers, which staffed our school entirely over the decades. We must receive state and federal aid if our schools are to survive. It should be crystal clear to all that if any sizeable portion of the nonpublic school students were to transfer to the Scranton public schools for lack of funds, these public schools already overcrowded would be faced with a crisis of providing rooms and teachers for these pupils. It would also place an almost impossible tax burden on the citizens of Scranton.

Because of the foregoing rationale and facts on how the public and nonpublic schools of Scranton complement each other in achieving quality education for all children, and be cause of the immediate need of nonpublic school education

in the city of Scranton, we acknowledge the importance of an Amicus Curiae Brief and submit this rationale for your use therein.

Sincerely yours,

s/ MONSIGNOR WILLIAM L. DONOVAN
Superintendent Diocesan Schools

ADVISORY C

August 5, 1970

Attorney James A. Kelly
Office of The Solicitor
School District of The City of Scranton
300 Scranton Life Building
Scranton, Pennsylvania 18503

Dear Attorney Kelly:

It has come to my attention that the legality of Act 109, known as Pennsylvania Non-Public Elementary and Secondary Education Act of 1968, will be argued before the Supreme Court of the United States.

I have studied this law with great interest and would like to acquaint you with some of the ramifications it would present to the Scranton School District should it receive an unfavorable decision by the Supreme Court.

There are 16,513 students presently enrolld in 31 Scranton Public Schools. We have a professional staff of 800.

There are 5,686 students enrolled in 22 non-public schools in Scranton consisting of pupils from the Diocese of Scranton parochial schools, the Hebrew Day School, St. Stanislaus Polish National School and the Scranton Preparatory School. The current acceptable pupil/teacher ratio of 30 pupils for one teacher would require that an additional 190 teachers be hired to staff these buildings.

As you are aware, we are in the process of a very ambitious building program which necessitated the closing of several of our school buildings. The condition of many of the remaining buildings has, according to the in-depth study done for our "Long Range Development Plan", deteriorated beyond the degree of life expectancy. Fourteen of our elementary schools were recommended for abandonment by the

year 1975. Even if the tax support were there (which it is not) it would be a physical impossibility, under existing circumstances and with present facilities, to house even half of the total population now attending Scranton's non-public schools.

If our district were to assume responsibility of these students it would be reasonable to expect that taxes (now considered by many residents as exorbitant) would be raised in the unconscionable amount of 50%. In the past few years there has been considerable support to a movement calling for a taxpayers' strike to object to the present structure. Such action, although novel, gives great concern to administrators such as myself.

In addition to the necessity of hiring 190 additional teachers it would be necessary to increase our food services, bus transportation, guidance, psychological and other related pupil services.

With the present militant climate among teachers toward negotiating their hours, wages, working conditions, inter alia, it could present a serious problem if the situation demanded the acceptance of these several thousand extra pupils without the extra staff increase required.

Many services are now provided to non-public schools in Scranton by monies received under our Title I, Elementary and Secondary Education Act Program. It is obvious that federal aid will continue to diminish. Aid from the state, provided under Act 109 could insure the continuance of many of these programs, some which are state mandated. Some of the programs are: Basic Skills (remedial reading and remedial mathematics) which provides special help for students in both a summer and winter program, Instructional Materials Program (provides use of libraries, audio-visual aids, purchase of audio-visual equipment, etc.; Program for

Advisory C

Severely Retarded Youth—Ages 16-21 conducted at Allied Services Rehabilitation Center under the direction of the Child Study Department; Physical Education Program conducted by teachers from nearby East Stroudsburg Pennsylvania State College which provides instruction at the elementary level for both public and non-public school youngsters; Cultural Art Program under the direction of the Art Department, Scranton School District; a pilot program "Why Children Don't Learn" under the direction of the Pupil Services Department; a Music Program which offers individual lessons in organ and instrumental music; a Pre-School program conducted at six centers throughout the city under the direction of the Scranton Public Schools; a Secondary Reading Improvement Program; a Speech and Hearing Clinic with schedules before and after school hours during the winter months and exclusively for non-public students during the summer months.

In the foreseeable future the curtailment or elimination of funding through sources other than "local" would necessitate that the financial burden for these important services become the sole responsibility of the non-public schools involved. Nor under the present plan of organization of the new Intermediate Unit system which will operate very soon in the Commonwealth can we assume that these services can be made available to these non-public schools.

Each year medical and dental examinations are conducted by Drs. on the staff of the Scranton Public Schools and nursing services are provided. These reimbursed medical and dental services—secular in nature—suggest to me an analogy between these services and those to be purchased under Act 109. This also applies to our Child Accounting Department which has jurisdiction over all schools in this school district,

whether public or non-public with reference to census enumeration and compliance with the attendance laws.

After taking a clear and practical look at the situation I feel strongly that Act 109 is reasonable and necessary and hopefully must, on the basis of the economic and educational factors alone, receive favorable treatment from the Supreme Court thereby assuring the continuance of parallel and complementary educational services in Scranton.

Yours truly,

s/ EUGENE M. LANGAN
Acting Superintendent
Scranton Public Schools

SCHEDULES

I, II, III, IV, V

Schedule I
The Scranton Public System Actual
1960 thru 1969

Year	Tax Rate Mills	Budgeted Disbursements	Instructional Salaries	% to Total ←	Instructional Expense Other	% to Total ←	Debt Service Improvements	% to Total ←	New Bldg. Rental	% to Total ←	Public Pupil Cost Debt Service Improvements	Public Pupil Cost New Bldg. Rental	Public Pupil Cost Per Public Pupil
1960	27.5	$ 7,020,287	$ 3,665,579	52.21	$ 220,652	3.14	$ 468,633	6.68	$		$ 28.27		$ 424.03
61	27.5	$ 7,613,455	$ 3,714,373	48.78	$ 276,664	3.63	$ 344,370	4.52	$		$ 20.75		$ 458.81
62	30.0	$ 7,903,731	$ 3,817,210	48.30	$ 265,653	3.36	$ 352,328	4.46	$		$ 20.97		$ 470.43
63	33.0	$ 8,602,979	$ 4,089,278	47.53	$ 275,805	3.21	$ 383,755	4.46	$		$ 22.60		$ 506.71
64	33.0	$ 9,025,047	$ 4,398,182	48.73	$ 286,109	3.17	$ 416,330	4.61	$		$ 23.93		$ 518.74
65	33.0	$ 8,944,096	$ 4,697,958	52.53	$ 104,126	1.16	$ 401,300	4.49	$		$ 23.93		$ 515.78
66	36.0	$ 9,019,878	$ 5,226,311	57.94	$ 608,213	6.74	$ 391,561	4.34	$ 116,730	1.29	$ 22.43	$ 6.69	$ 516.60
67	36.0	$ 10,113,592	$ 5,729,622	56.65	$ 419,025	4.14	$ 428,150	4.23	$ 116,730	1.15	$ 24.71	$ 6.74	$ 583.59
68	36.0	$ 11,339,974	$ 6,265,276	55.25	$ 529,586	4.67	$ 467,469	4.12	$ 116,730	1.10	$ 27.23	$ 6.80	$ 660.53
69	37.0	$ 11,790,547	$ 7,097,139	60.19	$ 486,795	4.12	$ 495,604	4.20	$ 116,730	0.99	$ 29.14	$ 6.86	$ 693.15

NOTE: This Schedule, although published by the School District Secretary Thomas W. Hogan, in cooperation with the Assistant District Secretary Edward J. Fitzsimmons, is based upon official records of the School District of the City of Scranton as subjected to audit by an independent certified public accountant, as filed in the Court of Common Pleas of Lackawanna County, Pennsylvania, and to the governmental audit of the Auditor General of Pennsylvania. Also, filed with Pennsylvania Department of Education.

Schedule II
The Scranton Public System Projected
1970 thru 1978

Year	Tax Rate Mills	Budgeted Disbursements	Instructional Salaries	% to Total ←	Instructional Expense Other	% to Total ←	Debt Service Improvements	% to Total ←	New Bldg. Rental	% to Total ←	Public Pupil Cost Debt Service Improvements	New Bldg. Rental	Cost Per Public Pupil
1970	39.0	$ 14,577,990	$ 7,988,083	54.80	$ 702,017	4.82	$ 533,954	$ 3.66	$ 414,515	$ 2.84	$ 30.70	$ 23.83	$ 838.10
71	43.0	15,567,621	8,763,431	56.30	770,328	4.95	519,429	3.34	632,515	4.06	29.76	36.23	891.87
72	48.0	16,617,204	9,359,345	56.32	822,710	4.95	498,009	3.00	750,515	4.52	28.38	42.77	947.07
73	51.0	17,679,508	9,995,781	56.54	878,654	4.97	440,018	2.49	856,515	4.84	24.89	48.46	1,000.26
74	54.0	18,817,867	10,675,494	56.73	938,403	4.99	393,760	2.09	960,515	5.10	22.23	54.22	1,062.20
75	57.0	20,010,409	11,401,428	56.98	1,002,214	5.00	326,750	1.63	1,069,515	5.34	18.34	60.01	1,122.86
76	60.0	21,338,083	12,176,725	57.07	1,070,365	5.02	316,613	1.48	1,178,515	5.52	17.66	65.75	1,190.48
77	62.0	22,640,286	13,004,742	57.44	1,143,150	5.05	285,775	1.26	1,205,515	5.32	15.86	66.88	1,256.12
78	65.0	24,064,473	13,889,065	57.72	1,220,884	5.07	268,325	1.12	1,234,515	5.13	14.77	67.97	1,324.99

NOTE: This schedule, where not actual for past years, is a projection based upon a 10 Year Long Range Development Program required by and filed with the Pennsylvania Department of Education, Harrisburg, Pennsylvania, on July 1, 1969, consultant advice of Davis MacConnell Ralston, Inc., Educational Consultants, Alexandria, Virginia.

SCHEDULE III
The Public System Plus Non-Public
1960 through 1969

Year	Total Actual Budget Disbursements	Millage Required	Total Actual plus 100% Non-Public	Additional Dollars Required	Total Actual Plus 50% Non-Public	Additional Dollars Required	Total Actual Plus 25% Non-Public	Additional Dollars Required
1960	$ 7,020,287	27.5	$ 10,385,813	$ 3,365,526	$ 8,703,050	$ 1,682,763	$ 7,861,669	$ 841,382
1961	7,613,455	27.5	11,471,588	3,858,133	9,542,522	1,929,067	8,577,988	964,533
1962	7,903,731	30.0	11,842,641	3,938,910	9,873,186	1,969,455	8,888,459	984,728
1963	8,602,979	33.0	12,764,082	4,161,103	10,683,531	2,080,552	9,643,255	1,040,276
1964	9,025,047	33.0	13,200,904	4,175,857	11,112,976	2,087,929	10,069,011	1,043,964
1965	8,944,096	33.0	12,903,223	3,959,127	10,923,660	1,979,564	9,933,878	989,782
1966	9,019,878	36.0	12,765,745	3,745,867	10,892,812	1,872,934	9,956,345	936,467
1967	10,113,592	36.0	14,108,266	3,994,674	12,110,929	1,997,337	11,112,261	998,669
1968	11,339,974	36.0	15,640,024	4,300,050	13,489,999	2,150,025	12,414,987	1,075,013
1969	11,790,547	37.0	16,127,587	4,337,040	13,959,067	2,168,520	12,874,807	1,084,260

NOTE: This Schedule, although published by the School District Secretary Thomas W. Hogan, in cooperation with the Assistant District Secretary Edward J. Fitzsimmons, is based upon official records of the School District of the City of Scranton as subjected to audit by an independent certified public accountant, as filed in the Court of Common Pleas of Lackawanna County, Pennsylvania, and to the governmental audit of the Auditor General of Pennsylvania. Also, filed with Pennsylvania Department of Education.

SCHEDULE IV
The Public System Plus Non-Public
1970 through 1978

Year	Total Projected Budget Disbursements	Millage Required	Total Projected plus 100% Non-Public	Additional Dollars Required	Total Projected Plus 50% Non-Public	Additional Dollars Required	Total Projected Plus 25% Non-Public	Additional Dollars Required
1970	$ 14,577,990	39.0	$ 19,574,742	$ 4,996,752	$ 17,076,366	$ 2,498,376	$ 15,827,178	$ 1,249,188
1971	15,567,621	43.0	20,630,767	5,063,146	18,099,194	2,531,573	16,833,408	1,265,787
1972	16,617,204	48.0	21,753,165	5,135,961	19,185,185	2,567,981	17,901,194	1,283,990
1973	17,679,508	51.0	22,868,857	5,189,349	20,274,183	2,594,675	18,976,845	1,297,337
1974	18,817,867	54.0	24,089,566	5,271,699	21,453,717	2,635,850	20,135,792	1,317,925
1975	20,010,409	57.0	25,358,591	5,348,182	22,684,500	2,674,091	21,347,455	1,337,046
1976	21,338,083	60.0	26,767,862	5,429,779	24,052,973	2,714,890	22,695,528	1,357,445
1977	22,640,286	62.0	28,123,250	5,482,964	25,381,678	2,741,482	24,011,027	1,370,741
1978	24,064,473	65.0	29,666,531	5,602,058	26,865,502	2,801,029	25,464,988	1,400,515

NOTE: This schedule, where not actual for past years, is a projection based upon a 10 Year Long Range Development Program required by and filed with the Pennsylvania Department of Education, Harrisburg, Pennsylvania, on July 1, 1969, consultant advice of Davis MacConnell Ralston, Inc., Educational Consultants, Alexandria, Virginia.

	Completed	1970 71	1971 72	1972 73	1973 74	1974 75	1975 76	1976 77	1977 78	1978 79
ELEMENTARY SCHOOLS										
NEW										
1. S.S. Educational Plaza		$1,500,000								
2. Oxford Plot			$1,500,000							
3. Woodrow Wilson			1,200,000							
4. Jackson Street					$1,500,000					
5. Grand Street						$1,800,000				
6. Bangor Heeights							$1,500,000			
7. Tripp Park								$1,500,000		
8. Prescott (No. 38)	$ 520,888									
9. J. F. Kennedy (No. 7)	489,252									
10. Chas. Sumner (No. 18)	937,732									
11. Neil Armstrong (No. 40)	2,867,172									
ADD. & RENOVATION										
1. Robert Morris (No. 27)	573,822			699,000						
2. John G. Whittier (No. 2)	413,185									
3. James Madison (No. 33)					325,400					
4. Francis Williard (No. 32)							379,000			
5. Geo. Bancroft (No. 34)								378,200		
MIDDLE SCHOOLS										
NEW										
1. West Side Middle School		3,600,000								
CONVERSIONS										
1. John J. Audubon (No. 42)	209,750									
2. North & South Jr. H. S.			1,059,600							
HIGH SCHOOLS										
NEW & ADDITIONS										
1. Central/Tech or New East		4,070,500								
RENOVATIONS/ MODIFICATIONS										
1. Central/Tech/West				1,344,000						
CENTRAL ADMINISTRATIVE & SERVICES										
1.Central Warehouse									$ 462,000	
2. Administration Bldg.										$ 250,000
SITE ACQUISITION RESERVE										250,000
TOTALS	6,011,801	9,170,500	3,759,600	2,043,000	1,825,400	1,800,000	1,879,000	1,878,200	462,000	500,000

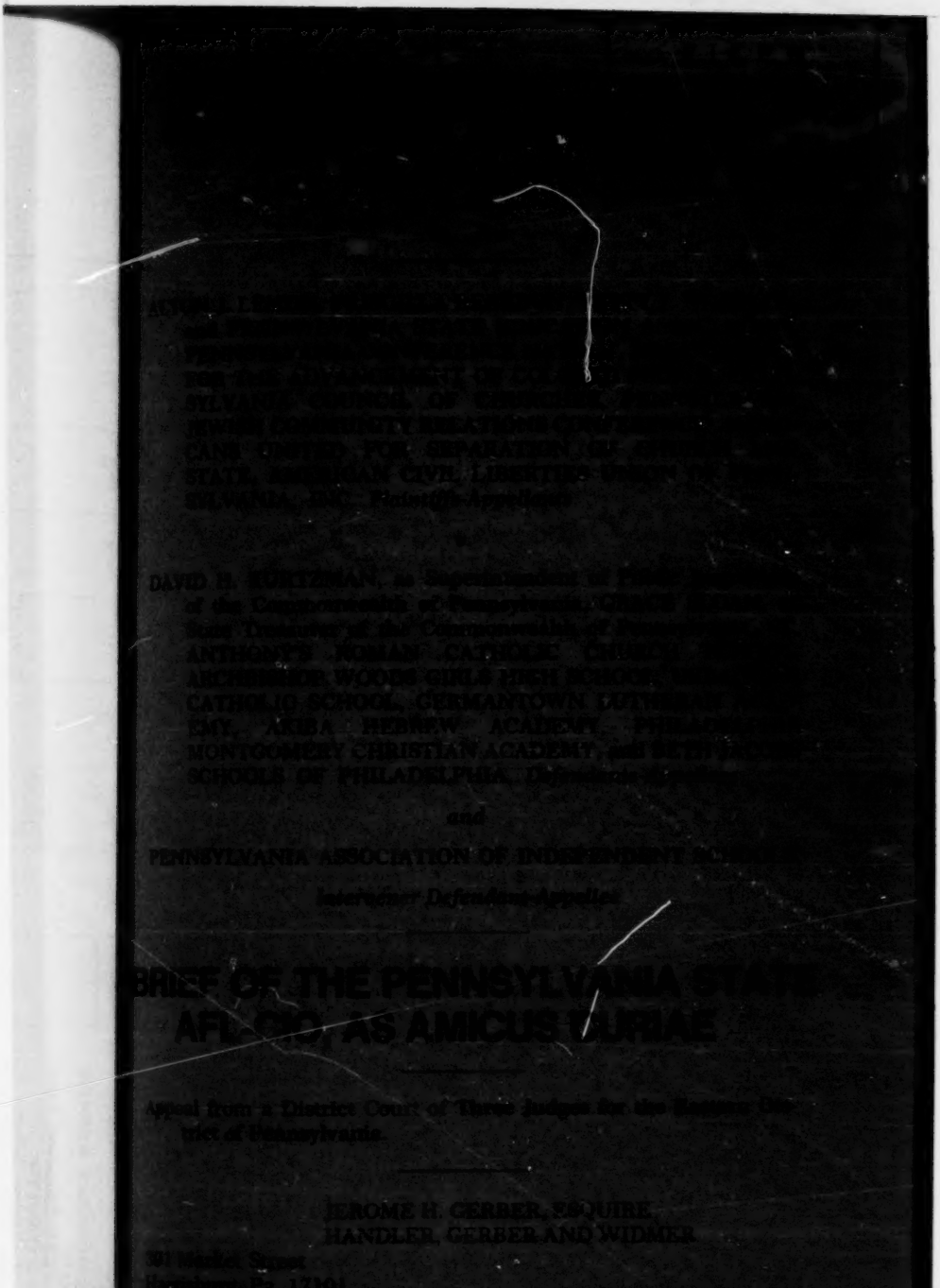
(Continued on Page 6-S)

Schedule V — (Continued)

RECAPITULATION:

COMPLETED PROJECTS	6,011,801	COMMITTED PROJECTS:	
		Elementary Schools	$12,281,600
		Middle Schools	4,659,600
		High Schools	5,414,500
		Administration	962,000
		Total	23,317,700

NOTE: This schedule, where not actual for past years, is a projection based upon a 10 Year Long Range Development Program required by and filed with the Pennsylvania Department of Education, Harrisburg, Pennsylvania, on July 1, 1969, consultant advice of Davis MacConnell Ralston, Inc., Educational Consultants, Alexandria, Virginia.



IN THE

Supreme Court of the United States

October Term, 1970

No. 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC. *Plaintiffs-Appellants*

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA, *Defendants-Appellees*

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervener Defendant-Appellee

The Pennsylvania State AFL-CIO is a federated labor organization to which are affiliated over 2400 national and local labor unions operating in the Commonwealth of Pennsylvania which in turn represent more than a million working men and women.

The Pennsylvania State AFL-CIO is deeply devoted to the concept of the separation of Church and State. However, this organization has acknowledged that in providing

essential services for the citizenry of the Commonwealth, young and old alike, it is often necessary for the State to utilize the facilities of non-public or church organized institutions.

In the past the Federal and State Governments in an effort to fully utilize all available facilities have cooperated with non-public and religious schools, hospitals, homes for the aged and other institutions through Medicare, Social Security, the GI Bill of Rights, the Academic Facilities Construction Act, the National Defense Act, the Anti-Poverty Act and numerous other legislative enactments. In each case the primary objective has been to furnish a service of the Government to its citizens without regard to the denominational or non-denominational character of the institution which is best able to provide that service. The Pennsylvania State AFL-CIO believes that it would be inconsistent, on one hand, to demand compulsory education in accordance with prescribed standards while, on the other hand, to deny financial support for school age children whose parents elect to have them receive their secular education in a religiously affiliated school.

The Legislature of Pennsylvania in enacting the Pennsylvania Nonpublic Elementary and Secondary Education Act, the Act of June 19, 1968, P. L. ———, No. 109, 24 PS 5602, et seq, has recognized that instruction in the form of mathematics, modern foreign languages, science and physical education are purely secular in nature and the teaching of these subjects is fully the responsibility of the State and the community regardless of where such courses are conducted. The Legislature, therefore, deemed it both pertinent and advisable for the State to purchase such services from private schools in which the children of this State are educated. The reimbursement to private institutions for these limited purposes is a proper and non-prohibited utilization of tax monies. Such expenditures fall within the same broad category as the utilization of tax revenues for the providing of fire and police protection for these same institutions or the provision for dental and

physical examination of the students who attend these institutions, the aid to nutrition and transportation of all children regardless of the character of the school which they attend.

The Court below upheld the validity of the Pennsylvania Act in question in the face of attacks upon it based upon the religious clauses of the First Amendment.

Chief Circuit Judge Hastie in his dissenting opinion predicts that by sustaining the Act under consideration here, the way would be opened for similar payments to sectarian hospitals, community centers and homes for the aged and infirm. In reality, where such payments constitute the meeting of the State's obligation under a purchase of service contract, Pennsylvania has approved such a concept since 1956.

In *Schade v. Allegheny County Institution District*, 386 Pa. 507, 126 A. 2d 911 (1956), a suit was brought to enjoin the Institution District from paying tax revenues to sectarian institutions or homes for board, care and maintenance of neglected children on order of the Juvenile Court. At that time, Article III, Section 18 of the Pennsylvania Constitution forbade the appropriation of State funds by the Legislature to any denominational or sectarian institution. The Supreme Court of Pennsylvania concluded that the payments did not constitute appropriations of State funds. The Court stated:

> "The cost of maintenance of neglected children either by the State or the County is neither a charity or a benevolence, but a governmental duty. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors. The services had been rendered before partial payment on account of same was received. A considerable part of this money is recouped by the Juvenile Court from the parents of the minor wards. The balance of the funds so expended are, in legal effect, *payments to the child—not the institution supporting and main-*

taining him or her. [See *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 374-375, 50 S. Ct. 335, 74 L. Ed. 913]***.

"The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor paying just debts to them when incurred at its direction or with its approval. Numerous cases can readily be visualized where such situations have occurred: i.e. payment of the bill of an injured employee to a sectarian hospital." 386 Pa. 512. (Emphasis added).

There is a clear analogy between the action of the State Agency in *Schade*, and the action complained of in the instant case. So also is the holding of the *Schade* case applicable to our facts. To paraphrase *Schade* — the cost of teaching science, mathematics, modern language and physical education to school age children is neither a charity nor a benevolence, but a governmental duty. The moneys received by private schools are in partial reimbursement for the sectarian education of such children. The services are rendered before the payment is made. The money thus expended is, in legal effect, a payment to the children, not to the school.

The Pennsylvania Supreme Court in the *Schade* case also considered and rejected an attack upon the legislation there in question based upon the Fourteenth Amendment to the United States Constitution, relying principally upon the decision of this Honorable Court in *Everson v. The Board of Education*, 330 U.S. 1, 15 (1947).

Following the *Schade* decision and based upon it the Attorney General of Pennsylvania ruled that it would be proper to make direct payments of public assistance monies to sectarian or denominational nursing homes. 1957 Pa. Op. Atty. Gen. 24, Formal Opinion No. 686, dated April 22, 1957. Shortly thereafter the Attorney General, again relying upon *Schade*, ruled that it was proper for the State Council for the Blind to make payments to sectarian in-

stitutions for medical treatment of blind persons and for tuition of blind and visually handicapped persons. 1958 Pa. Op. Atty. Gen. 272, Official Opinion No. 132, dated July 9, 1958.

In 1959, the Pennsylvania Legislature gave the State Department of Public Welfare broad powers to purchase services for individuals entitled to them. Administrative Code of 1929, Section 2329, added December 21, 1959, P. L. 1944 §8, 71 Purdon's Statutes §611.9. Later, in 1963, Pennsylvania abandoned its traditional concept of direct appropriations to non-sectarian hospitals to offset the costs of free patient care, a concept which denied State funds to denominational hospitals, and instituted a purchase-of-care program. Under this program, hospital bills of the medically indigent were partially paid for by the State without regard to the religious affiliation of the hospital. Public Assistance Law, Section 9, added August 13, 1963, P. L. 777, repealed and substantially re-enacted in the Public Welfare Code, the Act of June 13, 1967, P. L. ——, No. 21, 62 Purdon's Statutes §101, *et seq.*

In 1965, the General Assembly of Pennsylvania amended the Public School Code to provide for free transportation of students attending nonpublic, nonprofit schools. Act of June 15, 1965, P. L. 133 §1, 24 Purdon's Statutes (pocket parts) §13-1361. The validity of the provision was upheld by the Supreme Court of Pennsylvania in *Rhoades v. School District of Abington Township*, 424 Pa. 202 (1967), certiorari denied 389 U.S. 846, appeal dismissed 389 U.S. 11. The Supreme Court of Pennsylvania relied primarily upon this Honorable Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), and viewed its ruling as a logical extension of its earlier decision in *Schade*, supra.

Finally, nine days after this Honorable Court upheld the New York Statute requiring school districts to lend text books to students attending parochial schools, *Board of Education v. Allen*, 392 U.S. 236 (1968), the General Assembly of Pennsylvania enacted the Pennsylvania

Nonpublic Elementary and Secondary Education Act, the law under attack in this appeal.

We can thus see that over the past sixteen years, commencing with the *Schade* case, there has been an expansion of public services to the people of Pennsylvania. In the past, governmental services were denied to a class of persons who elected to obtain their care or education in a denominational institution, while at the same time, others, equally deserving government assistance, received it because they resorted to non-denominational institutions. Slowly this distinction has been and is being erased in Pennsylvania as elsewhere.

The prediction of gloom which Chief Circuit Judge Hastie has made in his dissenting opinion below that this case will prompt an expansion of similar payments in non-educational areas, overlooks the facts that for years such practices have existed and have been recognized. Payments to hospitals, nursing homes and related entities have been the forerunners upon which Pennsylvania has now built a program of educational assistance.

In every case, however, the State's assistance has been directed to the patient or the pupil and not the institution.

The law here under attack grants no special privilege to students attending private schools. Indeed, such students still receive far less State and local assistance than do their counterparts in public schools. Nevertheless, a step has been made to erase the total disparity that previously existed between such students and has enhanced the educational opportunities and standards of all the school children of the Commonwealth.

The Pennsylvania State AFL-CIO has long recognized the financial crises in the public schools and it views with equal concern the tremendous financial burden sustained by the parents of students attending private institutions of learning. The suggestion that students now attending non-public schools should seek instruction on the premises of public educational institutions would create such an additional burden on the public elementary and secondary

schools as to make this proposed solution a virtual impossibility. The Act here under consideration can well assist the Commonwealth in its efforts to avoid such a confrontation.

For the foregoing reasons, the Pennsylvania State AFL-CIO respectfully requests that the decision of the Court below be affirmed.

Respectfully submitted,

HANDLER, GERBER AND WIDMER
301 Market Street
Harrisburg, Pennsylvania 17101

BY / JEROME H. GERBER, ESQUIRE

No. 89

FILED
AUG 10 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOOD GIRLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervener Defendant-Appellee.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE LONG ISLAND CONFERENCE OF RELIGIOUS ELEMENTARY AND SECONDARY SCHOOL ADMINISTRATORS (LICRESSA), AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND INTERVENER DEFENDANT-APPELLEE

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No. 89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

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v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOOD GIRLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervener Defendant-Appellee.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE LONG ISLAND CONFERENCE OF RELIGIOUS ELEMENTARY AND SECONDARY SCHOOL ADMINISTRATORS (LICRESSA), AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND INTERVENER DEFENDANT-APPELLEE

Interest of the Amicus Curiae

The Long Island Conference of Religious Elementary and Secondary School Administrators (LICRESSA), the amicus curiae submitting this brief, are the chief administrators of voluntary, non-profit, full time, accredited, religious elementary and secondary schools in Long Island, New York, offering State approved curricula. The Conference is composed of the Lutheran High School Association, the Hebrew Day Schools, the Episcopal Schools, Diocese of Long Island, and the Education Department of the Roman Catholic Diocese of Rockville Centre. It is believed to be the first organization of its type in the nation. Its accredited religious elementary and secondary schools have a combined enrollment in excess of 100,000 children, who attend these schools under New York's compulsory education law.

The prime purpose of the Conference is that its members may meet, plan and work cooperatively with each other and with public educators in the common interest of furthering excellence in education for all children. The Conference has pioneered in advancing interfaith understanding and is living proof that religiously affiliated education is not a divisive force in our society but can be a major force in producing inter-religious harmony.

Religiously oriented schools pursue two distinct goals, religious instruction and secular education. The processes of religious and secular training in these schools are not so intertwined that clearly secular subjects become instrumental in the teaching of religion. The plain fact is that most subjects taught in religiously oriented schools are clearly *not* religious. To maintain accreditation in the field of education our schools must adopt state approved curricula and must meet state educational standards. As

educators we know we are achieving the same educational objectives as public school educators. New York school children—in both public and non-public schools—take common examinations such as the State Pupil Evaluation Programs Tests and the State Regents' Examinations. There are no religious questions asked on these examinations. They test secular knowledge only. Yet, based on the published results of these state examinations, our children perform equally as well as the children in public schools. We believe that this is a reflection of the quality of the teaching we are providing in secular subjects.

The Conference believes, along with a growing number of legislators, that reasonable measures designed to aid the secular educational objectives of non-public schools is in the public interest and is constitutionally sound. The matter is one of degree. Our schools comply with all the requirements of the State compulsory education law. When we add religious instruction to the school curriculum, we do not thereby constitutionally taint our whole educational fabric. We simply provide a supplement we believe is an integral part of the education of the whole child.

In support of its beliefs the Conference participated as amicus curiae before this Court in the New York Textbook Loan Law case. *Board of Education* v. *Allen*, 392 U. S. 236 (June 10, 1968). The textbook loan program approved by this Court has proved to be a valuable aid in relieving some of New York's problems. Administratively it has functioned well and smoothly and has not given rise to divisive influences and inhibitions of freedom. In its last session the New York Legislature took another forward step to relieve additional educational problems by enacting a Mandated Services Act under which New York reimburses its non-public schools for expenses incurred for certain mandated educational services such as the keeping of attendance records.[1]

[1] Education Law 207, Chapter 138 of the Laws of 1970.

The Conference is particularly interested in the instant case because this Court's decision in the present appeal will have far reaching impact on New York Law and on other educational programs throughout the Nation designed to permit assistance to the secular educational objectives of non-public schools as the general welfare requires.

We firmly believe that the Pennsylvania Non-public Elementary and Secondary Education Act does not constitute an establishment of religion but is a proper exercise of State concern to further and assist the secular goals of non-public education.

For these reasons we have obtained the consent of counsel for all parties in this case to file a brief amicus curiae herein in support of the constitutionality of the Pennsylvania Act and pursuant to such consent we have directed counsel to prepare and file this brief.

Summary of Argument

Appellants believe that state and church are so entangled in the administration of the Statute, and that the secular and religious are so intertwined in church related education that even the purely secular activities of church oriented schools cannot constitutionally receive state aid. We hold that the principles laid down by this Court in *Board of Education* v. *Allen, supra,* are applicable here and that nothing that was said in *Walz* v. *Tax Commission of the City of New York*—, U. S.—, 25 L. ed., 2d, 697 (1970) lessens the vitality of those principles in sustaining the Pennsylvania Statute.

The Statute does not employ religion as its standard for action or inaction. Its express purpose, as stated by the Legislature, is to support the purely secular objectives of non-public schools to meet the educational crisis existent in

the state as a result of the rapid increases in school costs and school population. Appellants can show nothing about the necessary effects of the Statute that is contrary to its stated purpose. Since the Statute specifically defines the secular services involved, it avoids entanglements between church and state that might arise should state officials be required to judge the lines of separation between sectarian and secular. Absent evidence in the record herein, it cannot be assumed that school officials will not honestly discharge their duties under the law.

The Statute is entitled to the presumption of constitutionality with which all such legislation is favored. It should not be invalidated on constitutional grounds unless its infirmities are unmistakable and not, as here, hidden in hypotheses and assumptions based upon extreme theories of separationism.

ARGUMENT

POINT I

Pennsylvania's Non-public Elementary and Secondary Education Act is constitutional under this Court's interpretation of the First and Fourteenth Amendments.

The case at bar involves the expenditure of State funds under Pennsylvania's Non-public Elementary and Secondary Education Act[2] (hereinafter the Statute) for the purchase of certain specific secular educational services from non-public schools accredited under the State's compulsory school attendance law. It involves findings and a declaration of policy by the Pennsylvania Legislature that a crisis exists in elementary and secondary education in Pennsyl-

[2] 24 P.S. No. 4601 *et seq.* (Supp. 1969).

vania and that non-public education, by providing instruction in secular subjects, contributes to the public welfare of the State. It was also found that twenty percent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's Compulsory School Attendance Laws in non-public schools, and that the State might fulfill a governmental duty by supporting the purely secular objectives of non-public education.

The principles laid down by this Court in *Board of Education* v. *Allen, supra,* and illumined further in *Walz* v. *Tax Commission of the City of New York, supra* are controlling here. Pennsylvania has chosen to recognize that its religious schools pursue two distinct goals, religious instruction and secular education. The First Amendment, made applicable by the Fourteenth, bans state assistance to the first but not to the second, lest official hostility to religion result. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Mr. Justice White recognized the difficulties in precisely defining that position in a specific case when he wrote in Allen:

> "Everson and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem like many problems in constitutional law, is one of degree.' Zorach v. Clauson, 343 U. S. 306, 314 (1952). See McGowan v. Maryland, 336 U. S. 420 (1961). Based on Everson, Zorach, McGowan and other cases, Abington School District v. Schempp, 374 U. S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion". *Board of Education* v. *Allen, supra* at 242, 243.

We believe that the statute on its face and in its express aim as stated by the legislature clearly meets the first requirement of the test for constitutionality fashioned in *Schempp* and endorsed in *Allen* "that there must be a secular legislative purpose".

We further believe that the statute has "a primary effect that neither advances nor inhibits religion". It is to this second part of the test that we shall address the remainder of our brief.

The Court's use of the adjective "primary" is not without significance. It focuses concern on the single most important effect of the statute. "A primary effect" cannot mean "multiple primary effects". Such a construction would render the word "primary" meaningless.

The "primary effect" of the statute might best be gauged by what it does and does not do.

The statute DOES:

> • Provide for payments from public funds to nonpublic schools, including religiously oriented schools, for the actual cost of certain teachers' salaries, textbooks and instructional materials required to provide secular educational services in courses limited to mathematics, modern foreign languages, physical science and physical education, after such services have been rendered.

• Require the approval of the State Superintendent of Public Instruction of all textbooks and instructional materials employed in the instruction.

• Require the achievement of a satisfactory level of student performance in standardized tests.

• Require ultimate State certification of teachers.

• Provide for the establishment of a non-public elementary and secondary education fund with monies taken exclusively from the proceeds of State horse racing and harness racing as the sole source of funding.

The statute DOES NOT:

• Employ religion as its standard for action or inaction.

• Coerce anyone or in any way restrain the free exercise of religion.

• Sponsor, fund or favor any religious activities of the schools involved.

• Entangle government in difficult classifications of what is or is not religious, or involve the State significantly or directly in the realm of the sectarian so as to give rise to divisive influence and inhibitions of freedom.

• Employ the organs of government for any religious purpose.

• Use essentially religious means to serve governmental ends where secular means would suffice.

• Effect favoritism among sects or between religion and non-religion.

• Work deterrence of any religious belief.

• Produce those official involvements of religion which would tend to foster or discourage religious worship or belief.

Not one of the positive or negative effects of the Statute set forth would seem to "advance" or "inhibit" religion.

The practices struck down in *Schempp, supra, Engel* v. *Vitale,* 370 U. S. 421 (1962), and *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203 (1948)—all of them involving distinctively religious exercises in the public schools—are examples of activities which this Court intended to be encompassed by the concept "primary effect advancing religion". On the other hand, Everson, McGowan and Allen upheld the constitutionality of bus transportation, Sunday closing laws and the furnishing of textbooks in recognition that these acts did not have "a primary effect of advancing religion" and that to hold otherwise would give them "a primary effect of inhibiting religion", a result which would violate religious freedom.

The principles emphasized by Mr. Justice Harlan in his concurring opinion in Allen are applicable:

> "The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality. Neutrality is, however, a coat of many colors. It requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." Abington School Dist. v. Schempp, 374 U. S. 203, 305 (concurring opinion of Goldberg, J.). Realization of these objectives entails "no simple and clear measure," id., at 306, by which this or any case may readily be decided; but these objectives do suggest the principles which I believe to be applicable in the present circumstances. I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly

> in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom," id., at 307, it is not forbidden by the religious clauses of the First Amendment.
>
> In my opinion, §701 of the Education Law of New York does not employ religion as its standard for action or inaction, and is not otherwise inconsistent with these principles." Board of Education v. Allen, supra, at 249, 250.

The Statute under review is completely neutral with respect to religion. It merely recognizes the role in secular education played by non-public schools and offers assistance in educational courses carefully limited under the Act to mathematics, modern foreign languages, physical science and physical education. On its face there is nothing about the necessary effects of the statute that is contrary to its stated purpose. In this legislation the State has properly chosen to satisfy its interest in secular education through the instrument of non-public schools. The only alternative means by which this general public need could be served would be to stand by helplessly and permit the deterioration of non-public schools to the point where their children would be moved en bloc into public schools—an alternative that would be as catastrophic to the public schools and to the solvency of the State as it would be debilitating to the principle of parental freedom of educational choice.

From the above it is clear that the principles laid down in Allen support Appellees' position unless those principles have been modified or overruled by the decision of this Court in *Walz* v. *Tax Commission of the City of New York, supra,* (May 4, 1970). In that case the New York City Tax Commission's grant of an exemption to church property was challenged as requiring a contribution to religious bodies and therefore was an establishment of religion. In upholding the exemption, Chief Justice Burger pointed

out that the course of constitutional neutrality in the area of First Amendment freedoms—

> "* * * cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, *which is to insure that no religion be sponsored or favored, none commended, and none inhibited.** The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally estabished religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and pratices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." Walz, supra at 701, 702.

The Chief Justice recognized the validity of the test applied in Allen in these words:

> "Similarly, making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment." Id. at p. 703.

*Emphasis added.

He then went on further to say:

> "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring or supporting religion, does not end the inquiry. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. * * * the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case." Id. at p. 704.

Nor, might it be added, is that the case at bar. State involvement in administering the statute is minimal. The controls imposed are only those reasonably necessary to assure quality, to limit cost and to secure solely secular educational objectives that are clearly defined and not left to administrative discretion. Given the public emergency faced by its educational resources Pennsylvania would have appeared to have successfully traversed the "tight rope" constitutional course necessary in creating administrative relationships between its public education officials and church oriented schools that preserves the autonomy and freedom of the schools while avoiding any semblance of established religion. The statute is a proper accommodation under that benevolent neutrality which must be the hallmark of interpretation of First Amendment freedoms, lest hostility to religion dominate.

On June 15, 1970 a three Judge Court struck down Rhode Island's Salary Supplement Act[3] which provided for the

3. Rhode Island Public Laws C. 245, 1969.

payment of state funds to teachers of secular subjects in non-public elementary schools, *DiCenso* v. *Robinson*, —F. Supp.—(D.C.R.I. 1970). In so far as that decision rests on the theory that the teaching of secular subjects in a religiously oriented school becomes a religious enterprise, it is contrary to *Allen* and evidences an hostility to religion that is constitutionally forbidden. The decision rested on the further ground that the Act involved the state in that form of excessive entanglement forbidden by the Court's understanding of the majority opinion of this Court in *Walz*. The *Schempp-Allen* test was the refined product of eight of the Justices of this Court in *Schempp* and was affirmed by the majority of this Court in *Allen*. It affords a viable and realistic accommodation to the educational and religious needs of our people in the area of First Amendment freedoms. *Walz* did not overrule *Allen so* as to render direct subsidies for clearly secular services to religiously oriented schools *ipso facto* unconstitutional. The administrative involvement in these programs is minimal rather than excessive. Its emphasis is on the quality, cost and production of secular objectives only and there is no intrusion into the sectarian goals of the schools. Programs actually involving "excessive entanglement" will be given short shift "while this Court sits." We do not find it in the modest programs undertaken in Pennsylvania and in Rhode Island. The holding in *DiCenso* is an unwarranted step backward from *Allen* that would cut the "tight rope" bridging the constitutional borders between Church and State, abort the legitimate progeny conceived along its narrow line and leave no "play in the joints" necessary for the operation of that benevolent neutrality by which government can accommodate the spiritual and secular needs of its citizens in the area of religious freedom. Indeed, it would inject that very rigidity into constitutional interpretation which

the Chief Justice feared could defeat the basic purpose of the First Amendment itself. *Walz, supra,* at 701.

The case foreseen by Mr. Justice Harlan in his concurring opinion in *Walz, supra,* is now before this Court. His words have special relevance here:

> "Whether subsidies or direct aid entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a later case upon a record that fully develops all the pertinent considerations such as the significance and character of subsidies in our political system and the role of the government in administering the subsidy in relation to the particular program aided. *It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government.* (emphasis added) Cf. e.g., my separate opinion in Roth *v.* United States, 354 U. S. 476, 496 (1957).
>
> I recognize that for those who seek inflexible solutions this tripartite analysis provides little comfort. It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without a constitutional toehold. Like the Chief Justice I am of the view that it is the task of this tribunal to 'draw distinctions, including fine ones, in the process of interpreting the Constitution.' The prospect of difficult questions of judgment in constitutional law should not be the basis for prohibiting legislative action that is constitutionally permissible." Walz, supra at 719.

Conclusion

The judgment of the District Court of Three Judges for the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*,

v.

DAVID H. KURTZMAN, ET AL., *Appellees*.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR APPELLEE SCHOOLS

OPINION BELOW

The majority and dissenting opinions of the three-judge District Court for the Eastern District of Pennsylvania are reported at 310 F. Supp. 35 (A78).[1]

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[1] References in parentheses are to the pages of the Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Constitution of the United States, article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . ."

Pennsylvania Nonpublic Elementary and Secondary Education Act, June 18, 1968, P.L. ——, No. 109; Pa. Stat. Ann. tit. 24 § 5601, *et seq.*[2]

QUESTIONS PRESENTED

The Pennsylvania General Assembly, for the declared public purpose of promoting the secular education of children in Mathematics, Modern Foreign Languages, Physical Science, and Physical Education, has enacted a statute whereby the Department of Public Instruction, pursuant to quality, secularity and fiscal controls, reimburses nonpublic schools for the audited partial cost of such instruction, where such schools are schools wherein the requirements of the compulsory attendance law may be met.

This appeal poses the following questions:

1. Does the Act violate the Establishment Clause of the First Amendment?

2. Does the Act violate the Free Exercise Clause of the First Amendment?

---

[2] This Act has been amended in two respects which do not affect the issues raised in this litigation. (See Act No. 86, March 25, 1970, P.L. ——; and Act No. 224, July 31, 1970).

3. Do the organizational Appellants have standing to bring this action?

4. Do the individual Appellants have standing to bring this action under the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

1. The Statute Involved

As revealed in the Act's statement of legislative finding and declaration of policy, one out of every five elementary and secondary school pupils in Pennsylvania attends a nonpublic school. There are eleven hundred eighty-one nonpublic schools in the state which are now under contract with the Commonwealth pursuant to Act 109 of 1968 (Pennsylvania Nonpublic Elementary and Secondary Education Act). Located in 55 of Pennsylvania's 67 counties, they have a total pupil population of 535,215 children.[3]

The purposes of the Act are set forth in its title, statement of finding, and declaration of policy. In these, the General Assembly stressed that the Commonwealth is faced with an educational crisis; that the services of Pennsylvania's nonpublic schools are essential to meet that crisis; and that unless assistance to such schools is afforded,

> ". . . an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania . . ." (Sec. 5602(6)).

The General Assembly also declared:

> ". . . the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those

[3] Most of these children attend Catholic schools.

> purely secular educational objectives achieved through nonpublic education". (Sec. 5602(3))

and that

> ". . . hazard to the education of children [occasioned by the overall education crisis] may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools." (Sec. 5602(6)).

The Act provides that the Commonwealth may enter into arrangements with nonpublic schools for reimbursement to them of part of the cost actually incurred by them in providing instruction in the four secular subjects specified, namely, Mathematics, Modern Foreign Languages, Physical Science, and Physical Education. The Act prohibits the blending or interwining of secular and sectarian instruction in these subjects by providing that instruction in such courses

> ". . . shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." (Sec. 5603(3)).[4]

A "nonpublic school" is defined to mean a school, other than a public school, wherein a resident of Pennsylvania may legally fulfill the requirements of the Pennsylvania compulsory attendance law.

By statutory definition "actual cost" for which reimbursement may be made is limited exclusively to three items of direct expense: textbooks, instructional materials, and teachers' salaries. Following the established pattern

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[4] This critically important provision is omitted from discussion in the Brief for Appellants and even from quotation or reference in the dissenting opinion below.

of governmental support of other welfare services,[5] payment is made *after* services are rendered.

The Act thus imposes safeguards in three essential aspects: (1) limitation to the four markedly non-value related subjects (2) quality controls, *viz.*, the requirements (Section 5604) of (a) state approval of the textbooks in question (b) state-approved standardized testing (c) teacher certification; and (3) fiscal controls.[6] The funding of the Act does not come from general taxation and is derived exclusively from a special fund which is not, and has never been, utilized for support of the public schools. Section 5606 expressly prohibits using money raised for the support of the public schools in the Commonwealth to pay for services under the Act, or even for expenses in connection with administration of the Act.[7]

---

[5] See, *e.g.*, *Schade* v. *Allegheny County Inst. Dist.*, 386 Pa. 507 (1956). While the Act employs the familiar arrangement known, in child care and sick care support, as "purchase of service", this mechanical device of support is not constitutionally critical. Purchase of service, with its feature of reimbursement following performance, is significant only as a device to better assure that performance is according to prescribed standards.

[6] "Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of *separate funds and accounts* pertaining to the cost of secular educational service, as to *establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement.* Such accounts shall be subject to audit by the Auditor General." (Emphasis supplied). (Sec. 5607(a)).

[7] The Act provides only for reimbursement, and the nonpublic school cannot, as the dissenting opinion below stated, designate "the portions of is curriculum for which it wants assistance." See, *Lemon* v. *Kurtzman*, 310 F. Supp. 35, 50 (Hastie, C.J., dissenting) (E.D. Pa. 1969). (A102).

This Act became effective on July 1, 1968,[8] and is now in its third year of operation.

2. The Proceedings Below

On June 3, 1969, Appellants (the Plaintiffs below) brought this action, naming as defendants the Commonwealth Secretary of Education,[9] the Commonwealth Treasurer, and seven nonpublic schools.[10] The action was brought as a class action, the named schools being sued as representative of (1) all sectarian educational institutions in the Commonwealth of Pennsylvania (2) all educational institutions in Pennsylvania which (allegedly) discriminate against persons by reason of race or religion, "the number of such sectarian and other educational institutions being too numerous to be conveniently joined as defendants in this suit." (Complaint, ¶ 7, (A11)).

The Complaint alleged in three counts that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against payments made thereunder.

On July 25, 1969, Appellee schools filed the following motions material to a disposition of this appeal: (1) Motion Under Rule 23(c), (2) Motion to Dismiss Complaint For Failure of Plaintiffs to Have Standing to Sue, and (3)

---

[8] Thereafter the Department of Public Instruction issued *Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act.* These were before the court below, at its own request as well as by stipulation of counsel. For the convenience of the Court, counsel have supplied official copies of these to the Clerk of the Court.

[9] The title, prior to July 23, 1969, was "Superintendent of Public Instruction".

[10] The court later granted leave to the Pennsylvania Association of Independent Schools to intervene as a party defendant for purposes of presenting argument on the Defendants' Motion to Dismiss.

Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

After filing their Rule 23(c) motion for a hearing to establish that the seven named defendant schools were not representative of the 1,181 nonpublic schools participating under the Act, Appellants filed their Answer thereto stating:

> "Plaintiff(s) agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure." (A42).

On August 20, 1969, the court entered the following order:

> "4. In the light of plaintiffs' 'Answer to Defendants' Motion under Rule 23(c)', IT IS FURTHER ORDERED (a) that the within action shall not be maintained as a class action . . ." (A54).

Notwithstanding the foregoing actions, Appellants subsequently persisted in pressing their action as an attack upon the validity of the Act in all of its applications. See Plaintiffs' Memorandum on the Necessity of a Three-Judge Court, (A58-A63); Excerpt From Oral Argument, (A64-A65). Thus, Appellants limited their claim to one of unconstitutionality of the statute on its face as to all schools and not merely with regard to a particular school or class of schools.

After briefing and argument, the court ruled as follows:

(a) None of the organizational Appellants had standing to sue.

(b) None of the individual Appellants had standing to sue under the Equal Protection Clause.

(c) Only one of the individual Appellants (Lemon) had standing under the Establishment Clause.

(d) All individual Appellants had standing under the Free Exercise Clause.

(e) The Act does not violate the Establishment or Free Exercise Clauses. Respecting the Establishment question, the court held the Act to have a secular legislative purpose and no primary effect that advances or inhibits religion. 310 F. Supp. 35, 45, 47 (E.D. Pa. 1969) (A91, A92, A95). Respecting the Free Exercise question the court held that the Act does not coerce anyone in the practice of his religion. *Id.* at 48-49. (A99).

The dissenting judge found that no Appellant had standing under either the Equal Protection or Free Exercise Clauses. He confined his opinion to Appellants' allegations with respect to the Establishment Clause and held that the motion to dismiss should be denied.

SUMMARY OF ARGUMENT

Commonly with the other key population states, the Commonwealth of Pennsylvania, from 1960 forward—experiencing the combined effects of financial stress, rise in school population and demands for quality education—was faced with an increasingly enveloping crisis. For schools enjoying total public support the statewide crisis was serious. For the State's nonpublic schools—dependent solely on personal contributions—it was threatening. The threat to the latter was equally a threat to the former because, particularly in the great urban centers of the State, nonpublic (largely parochial) schools had long borne the critically important burden of educating a substantial percent of Pennsylvania's total school population. In 1968 the General Assembly of Pennsylvania enacted the legislation here challenged as a response to its public-nonpublic educational crisis.

That legislation, Act 109 of 1968, provides Commonwealth support for four areas of instruction in the non-

public schools: Mathematics, Modern Foreign Languages, Physical Science, and Physical Education. The mode of support (purchase of service) was patterned on long-tried Pennsylvania programs in child care and health care. The Act, now in its third year of operation, has been a contributing force in helping to stem the tide of educational deterioration in the State.

Appellants attack the Act, under the Establishment and Free Exercise Clauses of the federal constitution, because of its inclusion of religiously affiliated schools. They also allege that the Act is violative of the Equal Protection Clause because, so they say, it has an effect of promoting segregation. They attack the Act on its face and not in its application.

The prior applicable decisions of this Court sustain the validity of Act 109. In *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the Court, subsuming to its holding all its prior Establishment Clause decisions, set forth the test applicable to legislation challenged under the clause. The legislation, to withstand such challenge, must have a "secular legislative purpose" and a "primary effect that neither advances nor inhibits religion". The facts of this case, as set forth in the Statement of the Case and analyzed in Point III of this brief (pp. 25-30) amply demonstrate that Act 109 serves a vital secular and public purpose in Pennsylvania.

Moreover, the Act, seen in the light of this Court's decisions in *Allen, supra*, and *Walz* v. *Tax Commission*, — U.S. —, 25 L. Ed. 2d 697 (1970), cannot be said to have a primary effect that advances religion. Appellants elaborate their Establishment Clause argument with the claim that, under the teaching of *Walz*, Act 109 should be held as creating an unconstitutional "entanglement" between churches and the State, leading to "divisiveness" in the community and the oppressing of religion. They thus misread the Act, the decision in *Walz*, and the facts of life

in the United States where myriad successful governmental programs, through sustained and detailed administrative relationships, provide funding for worthy secular objectives carried out by private (including religiously affiliated) agencies. These have long enjoyed public confidence. They have neither bred division nor inhibited religion.

Under settled rulings of the Court, it is clear that the Act does not deny the free exercise of his religion to anyone; further, that no Appellant has Free Exercise standing. With respect to Appellants' claim of a denial of Equal Protection, no Appellant has standing to sue under the Equal Protection Clause because none asserts a requisite personal stake in the outcome of the controversy.

ARGUMENT

I. THE NATIONAL SIGNIFICANCE OF THIS CASE

The Educational Crisis. Plainly, a crisis exists in the nation respecting the educating of her youth. Public school budgets everywhere are at an all-time high but must compete with the general rise in budgetary demands of all other governmental services. While in every corner of the nation inflation and taxation are the commonest subjects of discussion, concern for education—a concern related to the very stability of the society—is the most profound concern now felt by most citizens.

A central factor in the national educational crisis is the nonpublic school. 6,400,000 children are enrolled in nonpublic (mostly parochial) schools—almost one out of every ten school children in the nation. In the major industrial states the proportion is higher—in Pennsylvania, Massachusetts, Illinois and New Jersey it is 22 per cent; in New York, 21 per cent; in Ohio, Michigan and Connecticut, 15 per cent. The percent of nonpublic school enrollment is

critical in the ten metropolitan regions of highest population concentration:

New York-Newark-Jersey City	28%
Los Angeles-Long Beach	13%
Chicago-Gary	32%
Philadelphia	34%
Detroit	21%
Boston	23%
San Francisco-Oakland	13%
Washington, D. C.	18%
Pittsburgh	29%
St. Louis	29% [11]

While, with respect to parochial schools, this central factor has its roots not only in conscientious choices of citizens but also in a dark history of religious and anti-immigrant exclusion,[12] it is an inescapable fact today, vitally related to the economy of key states and key cities in the nation, and in particular to their Black and Puerto Rican neighborhoods where parochial schools, due to no other factor than the personal dedication of their staffs, have long been a constructive force. The nation's nonpublic schools have, since their beginning, effected great savings to the public. But, as President Nixon pointed out on March 3, 1970:

> "*If most or all private schools were to close or turn public, the added burden on public funds by the end of*

[11] The figures are for elementary school population. It is believed that secondary school figures would not materially change the percentages given. Source: U.S. Bureau of the Census as summarized by Havighurst. (See Supplement A, Part 3).

[12] See, F. CURRAN, CATHOLICS IN COLONIAL LAW (1963); G. MYERS, HISTORY OF BIGOTRY IN THE UNITED STATES, 140-295 (1943); 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES, 830, *et seq.* (1950). *See generally,* R. A. BILLINGTON, THE PROTESTANT CRUSADE—A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1938); 2 T. MAYNARD, THE STORY OF AMERICAN CATHOLICISM, 255-281 (1960).

> *the 1970s would exceed $4 billion more needed for facilities.*" President of the United States, Message to the Congress on Education, March 3, 1970, 91st Congress 2d Session, H.R. Document 91-267, 9. (Emphasis in original text).

This statement could be readily paraphrased in terms of the now imperiled nonpublic schools of Pennsylvania. In 1967 it was found that, in terms of per pupil educational cost alone, the local tax impact of the continuing nonpublic school cutbacks would before long prove intolerable.[13] The public schools, if truly threatened statewide in the crisis which its spokesmen (correctly) claimed it to be engulfed, could not begin to consider taking on substantial added nonpublic school population. Any attempted "phaseout" of nonpublic education in Pennsylvania would plainly encounter impossibility in the end and chaos in the process. For all larger communities in the Commonwealth—with already beleaguered public school systems—there would be no facilities to phase into. The attempt to move substantial nonpublic school populations into public schools would, in those communities, plainly result in administrative disorder, the long-term effects of which would be visited upon administrators, teachers, parents and, most of all, children.

Response to the Crisis. Pennsylvania, as one "social laboratory" among the fifty states[14] considered thoughtfully the problem of the inseparably connected nonpublic-public school crisis and the now evident need to utilize *all* available community resources in meeting that crisis. Following two series of legislative hearings, in which various proposals were advanced and extensive testimony from all interested parties was heard, the General Assembly enacted Act 109 as an express response to the crisis.[15] The

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[13] See Supplement A, Part 2.

[14] See, *Roth* v. *United States*, 354 U.S. 476, 505 (1957) (Harlan, J., concurring).

[15] See Pa. Stat. Ann. tit. 24, § 5602(6).

form of legislation was one having Pennsylvania roots in long-tried child care and sick care statutes in which the state and private (including religious) institutions had enjoyed successful administrative relationships. The Act was one reflection of a growing view at the federal level and in the key population states, that, while it is not lawful for government to support religion, neither is it possible or desirable for it to supplant the voluntary effort in education. Government, in this view, may aid carefully defined secular objectives achieved by private, church-related educational agencies. (See Supplement B, Part 1). Following the enactment by the Congress of the National Defense Education Act, 20 U.S.C. § 445, and the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241, which recognized the principle of governmental assistance to religiously affiliated schools, states having major nonpublic school populations have written statutes which provide a similar recognition, particularly meaningful in these jurisdictions in relation to their nonpublic-public educational crisis. (See Supplement B, Part 2).

Government as an enabler of voluntarism. The ultimate significance of Act 109 (and thus of this litigation) is not in terms merely of the tax impact of Pennsylvania's nonpublic schools upon that state's educational present and future, but in broad terms of educational freedom, religious liberty and the maintenance of *voluntarism* as essential to a free society.

In our now heavily welfare-oriented society, massive governmental spending is dominant,[16] *and individual men*

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[16] The costs of government having spiraled upward since World War II. Between 1950 and 1968 the school population ages 5-17 increased from 30.2 million to 52.3 million while the expenditures for public education jumped from $5.84 billion in 1950 to $35.51 billion in 1968. *Statistical Abstract*, 1969, 111. Although national government expenditures remained at a high level during the 1955-65 decade, state and local government general expenditures rose at more than twice the rate of the national government's gen-

and women, even when banded together in associations or institutions, no longer possess the economic resources with which to maintain diverse, non-state endeavors in education and welfare. See Van Alstyne, *Constitutional Separation of Church and State: The Quest For a Coherent Position*, 57 *Am. Pol. Sci. Rev.*, 865 at 880-882 (1963).

Education is plainly the most important aspect of voluntarism and that which is most meaningful in terms of a free society. It is vain to imagine that a broad voluntary effort in education, in an America whose life is increasingly dominated by governmental spending, can continue without a measure of public aid. In the absence of such help, all children (except those of the very rich) will in

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eral expenditures. Committee for Economic Development, *Fiscal Program for a Balanced Federalism*, New York, 1967, 9-10. Federal grants-in-aid programs proliferated during the 1960's to the point where Congress found it necessary to publish catalogues of the programs available. Senate Committee on Government Operations, Subcommittee on Inter-Governmental Relations, *The Catalog of Federal Aids to State and Local Governments*, Committee Print, April 15, 1964, and *Supplement*, January 4, 1965. By early 1970 Arthur F. Burns wrote that the number of federal categorical programs of all types exceeded 600. "The Control of Government Expenditures", *Tax Review*, Volume XXXI, January, 1970, p. 3. In his final Budget Message to Congress, President Johnson had noted that between 1964 and 1969 some 60 education measures had been enacted by Congress. *Congressional Record*, Volume 115, p. 717, January 15, 1969. The magnitude of the expenditures is demonstrated by the expansion of the social welfare outlays under public programs. In the depression year of 1935—before the adoption of most of the present programs—the total expenditure for state and federal programs in this broad classification was $6.6 billion. Preliminary estimates of all social welfare expenditures in 1968 was placed at $112.4 billion. *Statistical Abstract*, 1969, p. 274. In 1970 it was stated: "Federal aid to the poor will alone cost $27 billion this year in contrast to $12 billion in 1964. Grants in aid to states and localities will cost about $25 billion in contrast to $15 billion in 1967, $10 billion in 1964 and $5 billion in 1958." "The Control of Government Expenditures", *Tax Review*, Volume XXXI, January, 1970, p. 3.

the near future perforce be educated in public schools. No criticism of public education is implied by the recognition that many citizens desire schooling for their children other than that offered by the state—whether for religious, cultural, intellectual, disciplinary, ethnic, or other reasons. That a choice of such schooling is a fundamental liberty has long been settled by this Court. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Enshrined though it is in legal contemplation, that liberty will be effectually denied when the combined factors of governmental spending, heavy taxation of the person and high educational cost will have left most citizens with no choice but state education. In a society in which the state alone is educator, the state will inevitably tend to become the determiner and teacher of all values by which men live.

There is evidently needed today a balanced role for government in education. In a truly libertarian role, government should foster the public interest not only by providing public education at state expense, but also by affording *partial* "enabling" assistance to private education, limited to secular functions which it performs and with those safeguards necessary in light of community interests.

Act 109 does no more than provide the Commonwealth a role as an enabler of voluntarism in education.

Consequences of the decision in this case. If the peculiarly noncontemporary constitutional proposition which the Appellants herein seek to promote were to be adopted by this Court, a number of important existing statutes aiding education in nonpublic institutions would necessarily be threatened, and their evident effect in ameliorating the critical educational needs of America's swelling urban communities frustrated. Were the Court to adopt Appellants' absolutist position, federal laws involving at least eighty-four educational programs administered by some fourteen departments and agencies of the federal govern-

ment would be placed in jeopardy. (See Supplement B, Part 1). Appellants' fundamentalist view, implicitly attacking church relationship as the essential vice of Act 109, cannot, once it is applied, be contained within a perimeter represented by the facts of this case. Nothing which this Court has so far held lends basis to their view. To the contrary, the teachings of this Court point with unmistakable clarity to the constitutionality of the accommodation to intellectual and religious liberty which Pennsylvania created in Act 109.

II. THE POSTURE OF THE CASE

This appeal is from the district court's granting of Appellees' Motion to Dismiss under Rule 12(b)(6), since the Complaint failed to state a claim upon which the requested relief could be granted. The proceedings in the lower court disclose solely an attack by the Appellants on the constitutionality of Act 109 on its face. They did not seek to void the statute on grounds of any statewide practice or policy of the nonpublic schools as a class; statewide, they claimed only that the "church-relatedness" of "most" of the nonpublic schools dooms the statute. Appellants, moreover, have limited their attack solely to the seven Appellee Schools. Even assuming that these seven schools —less than six-tenths percent of all nonpublic schools in Pennsylvania—are constitutionally disqualified by their practices from participating under Act 109, that fact could not invalidate the statute. Hence, affirmance of the district court's judgment that Act 109 is constitutional does not preclude any qualified party from alleging and proving facts which would make the application of the Act unconstitutional with respect to a particular school.

Having directed their attack exclusively on the statute in its universal operation, Appellants themselves ripened this case for disposition under Rule 12(b)(6). They cannot now plead for discovery of trial on issues which they made irrelevant.

A. The Proceedings Below

Appellants repeatedly alleged that the ". . . act on its face and as applied *by the defendant Superintendent of Public Instruction and the defendant State Treasurer . . .*" is unconstitutional. (Complaint, ¶¶ 12, 13, 14, 15, 18, 19 and 20. A12-15). They failed to allege, however, what particular actions were taken by the named state officials in violation of the statute. No charge is made that the Rules and Regulations, under the Act, are unconstitutional as promulgated, administered or applied. Indeed, Appellants' counsel admitted that the Complaint, notwithstanding its employment of the phrase, "as applied", did not allege official maladministration of the Act and insisted that the Complaint was aimed at the facial constitutionality of the statute:

> "And it is this *statutory machinery in its entirety* which is claimed to be *unconstitutional* in the present complaint. Obviously, we are not concerned here with the improper exercise of authority in a particular case where the action purports to rest on an otherwise constitutional foundation. In this case *the foundation itself, the underlying statute,* by which taxpayers funds are sought to be given to sectarian institutions is claimed to be invalid and the doom of that foundation on a state-wide basis is the obvious objective of the present case." Plaintiffs' Memorandum on the Necessity of a Three Judge Court (A60). (Emphasis supplied).

Thus, as to official action, the "application" claim relates solely to the terms of the statute. As to action by others, the "application" claim is pitched at the Appellee Schools. Nowhere in the Complaint do Appellants charge that the Act (assuming that it is constitutional on its face) can be voided by applying it to the statutory classification of "nonpublic" schools. It stands to reason that if the Act passes constitutional muster on its face and is not misapplied by the state officials so long as the beneficiaries of the Act are nonpublic schools and otherwise qualify under

the Act, receipt of funds pursuant thereto can in no sense be unconstitutional. Assuming, *arguendo*, that this ambivalence in the Complaint could have been resolved in favor of making out an application claim, the record below makes it abundantly clear that Appellants below foreclosed such a reading of the Complaint.

Appellants selected only seven of the 1,181 nonpublic schools then under contract pursuant to Act 109. They were joined as ". . . representative of all sectarian institutions in the Commonwealth of Pennsylvania and of all educational institutions (presumably both public and nonpublic) [which discriminate against persons on racial or religious grounds] the number of such sectarian and other educational institutions being too numerous to be conveniently joined as Defendants in this suit." (Complaint ¶ 7 (A11)).

A reading of the "Factual Allegations" and, indeed, of the entire Complaint, reveals only three statements of fact with respect to nonpublic schools:

(a) their policies and practices discriminate against students or teachers on racial or religious grounds (Complaint, ¶¶ 7, 14 and 15 (A11-A13))

(b) and in that respect, the named schools are representative of all such sectarian institutions in the Commonwealth and all educational institutions, and

(c) that the schools are church-related—that is, they are controlled by a church which promotes a particular religious faith through the operations in the school. (Complaint, ¶ 13, A12-A13).

Following service of the Complaint, Appellee Schools moved under Rule 23(c) for a hearing and determination that the action not be maintained as a class action. This motion afforded Appellants the opportunity for a full and complete evidentiary hearing to show: whether, in fact, the seven named schools had the policies or practices alleged in the Complaint; whether, and to the extent to which, they were church-related, and whether and to what

extent, they were "representative" of any one or more of the 1,181 schools (denominational, multi-denominational, or nondenominational) under the Act. In the proposed hearing, Appellants could have tried to clarify the meaning of their allegation, "most of the other educational institutions". (Complaint, ¶¶ 13, 14, 15 (A12, A13)).

A Rule 23(c) hearing would have been the only fair way, with respect to all nonpublic schools not then before the court, to determine whether any of those schools should fall within the alleged class whose rights Appellants sought to have determined and bound by the judgment of the court. Moreover, the hearing would have followed the teaching of *United States* v. *Raines*, 362 U.S. 17, 23 (1960), that the court not reconsider the constitutionality of an act in applications not before it.

Appellants did not want a factual hearing. Instead their Answer to the Rule 23(c) motion stated: "Plaintiff agrees (*sic*) that the action shall not be maintained as a class action under Rule 23(c) . . ." (A42). Accordingly, the court entered an order directing that the action should not be maintained as a class action. (A54). This made it crystal clear that Appellants' attack was solely on the face of the statute.

At this stage of the proceedings the lower court questioned the propriety of a statutory three-judge court and directed the parties to submit briefs on the necessity thereof.

In their memorandum on that question (A54) Appellants insisted upon a three-judge court as necessary to nullify the statute as a matter of law. In that connection, they declared that their Complaint must be read as follows:

> "The complaint, by direct allegation, attacks the basic constitutionality of a statute which provides for statewide aid to private schools. That statute is challenged both on its face and as applied as violative of the First and Fourteenth Amendments. *Thus, the entire statu-*

> *tory scheme is claimed to be unconstitutional* and is sought to be placed in jeopardy . . . *Certainly it would be a strained misreading of the complaint to in any way construe it as limited to a particular grant to a particular school or class of schools or to anything less than an attack on the entire statutory scheme.* (Emphasis supplied).
>
> . . . in this case the foundation itself, the underlying statute, by which taxpayer funds are sought to be given to sectarian institutions is claimed to be invalid and the 'doom' of that foundation on a statewide basis is the obvious objective of the present case."

On oral argument, Appellants' counsel persisted in this position:

> "*I am not saying,* and I think I have made this clear, *that this Act is only unconstitutional as to these defendant schools.* I am talking about it being unconstitutional in its entire *purpose,* thrust and *effect* . . ." (Excerpt from Oral Argument, A65). (Emphasis supplied).

Having thus limited their allegations of church relatedness and disqualifying practices solely to the seven Appellee Schools and having abandoned the allegations of representativeness of these schools, Appellants paved the way for summary disposition of their First Amendment claims.

B. The Propriety of Dismissal of the Complaint Under Rule 12(b)(6)

With the "Factual Allegations" of the Complaint in this posture, the district court then proceeded to determine whether Appellants set forth any claim upon which the requested relief of statutory nullification could be granted.

In Paragraph 18 of the Complaint (Section III, "Causes of Action"), Appellants aver, in the words of the *Allen* test, that the statute's purpose and effect advances religion. This is clearly a conclusion of law. That paragraph

further alleges that Act 109 finances the blending of sectarian and secular instruction by providing direct aid to "sectarian schools". These are equally conclusions of law.

In judging the sufficiency of the Complaint as a matter of law, the district court followed the classic formula:

> "A motion to dismiss is the usual and proper method of testing the legal sufficiency of the Complaint. For the purposes of a motion, the well-pleaded material allegations in the Complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." 2A Moore's Federal Practice 10.08 (1968).

If Appellants' view of the office of this motion is correct, the Rule must be eliminated. They would insist upon full discovery and trial of the issues in all lawsuits.

The theory which Appellants did urge this Court to accept is that once a complaint characterizes a statute as "unconstitutional",[17] or for that matter, a document attached to the complaint as a "contract",[18] the Court is

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[17] See, *e.g.*, *Nortz* v. *U.S.*, 294 U.S. 317 (1935) (this Court dismissing a suit on demurrer and holding that plaintiff's allegations as to the legal effect of the legislation therein involved are not admitted for the purpose of the motion). See aso, *Pacific States Box and Basket Co.* v. *While*, 296 U.S. 176 (1935) (this Court holding in affirming a dismissal of the complaint on motion that the presumption of regularity in a constitutional case is overcome by pleading conclusions of law); *LeClair* v. *Swift*, 76 F. Supp. 729 (E.D. Wis. 1948) (stating that general conclusions of fact do not rebut the presumption of constitutionality of state action).

[18] See, *e.g.*, *Droppleman* v. *Horsley*, 372 F. 2d 249 (10th Cir. 1967) (holding that a motion under Rule 12(b)(6) does not admit the legal affect of a writing attached to a complaint); *Halliburton Co.* v. *Norton Drilling Co.*, 302 F. 2d 431 (1962) (dismissing a third party complaint in which the pleader characterized his dealings with the third party as a contract and holding that this characterization should be afforded no weight in determining the sufficiency of the Complaint); *Case* v. *State Farm Mutual*, 294 F. 2d 676 (5th Cir. 1961); *Ott* v. *Holme S. & L. Ass'n.*, 265 F. 2d 643 (9th Cir. 1958).

barred by that conclusion from preliminarily examining the legal consequences of the writing (either statute or document) and must proceed with discovery and a trial on the merits.

Mr. Justice Holmes disapproved of a pleader's attempt to foreclose the Court's appraisal of an allegedly unconstitutional statute by pleading his claim with conclusions of law. In *Pierce Oil Corp.* v. *City of Hope,* 248 U.S. 498 (1919), the plaintiff brought an action to enjoin as unconstitutional the operation of an ordinance which it said was unreasonable since it deprived it of property without due process. A demurrer was filed to the complaint which was sustained in the lower court. In holding that the complaint failed to state a claim, Mr. Justice Holmes refused to be bound by the pleader's characterizations of the ordinance, stating:

> "The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this court must decide, is not admitted by the demurrer. If it be taken to allege that the facts exist that lead to that conclusion, it stands no better . . . Only facts well-pleaded are confessed." *Id.* at 500.

Freed from the strictures with which Appellants attempted to shackle it, the lower court examined the purpose and effect of Act 109 and concluded that it was constitutional on its face. Appellants' attempt to characterize this action of the court as deeming their Complaint to be "wholly frivolous" is beside the point. The point is that the Complaint is insufficient to state a claim upon which the requested relief can be granted. No resort to pithy phrases such as "wholly frivolous", can convert unsupported conclusions of law into sufficient pleading.

That summary dispositions of issues under the Religion Clauses is neither novel or improper, as Appellants suggest,

is manifest from this Court's recent landmark decisions in *Board of Education* v. *Allen, supra,* and *Walz* v. *Tax Commission, supra.*

C. The Non-necessity for Discovery and Trial

In their Summary of Argument Appellants dedicate their brief to two propositions:

> (a) that " . . . Act 109 is *per se* unconstitutional on its face" and
>
> ". . . (b), since, if not, its basic concept, under which tax money is given to church institutions as a subsidy to be used by those institutions as they choose, is a scheme without precedent in American constitutional history. It therefore requires all of the invaluable setting which only the fullest development, by discovery and evidence, can provide." (Appellants' Brief, 13).

What is to be gained by discovery and evidence with respect to proposition (b)? Certainly, there is nothing to discover about "tax money"; the funding provisions of the Act are clear. The fact of payment to "church institutions" is obvious from the face of the statute and involves no need for trial. That the legislation is a "scheme without precedent in American constitutional history" is meaningless in terms of the necessity of a trial.

The major portion of Appellants' brief plays variations on the theme above discussed. The brief is replete with expressions of Appellants' "offers to prove" and "willingness to undertake" to prove whole hosts of facts which are not properly before this Court on a Motion to Dismiss, and even if they were, are either totally irrelevant to the issues or facts which Appellants had ample opportunity to prove.

If Appellants numerous "offers to prove" are genuine and accepted by this Court, there will result a principle which requires a Rule 12(b)(6) motion to be denied so long as the opponent of the motion offers to prove facts of any kind. Moreover, many of Appellants' offers to prove, if factually sustainable, in no way affect the constitutionality of the statutory scheme; at most, if in fact the practices which Appellants imagine occur, they would be acts committed in violation of the Act. This is a distinction which has consistently eluded Appellants in their ardor for discovery: there is a vast difference between practices which are not permitted by the Act and practices authorized by the Act. The former are violations of the Act; the latter would make the Act unconstitutional on its face. Appellants attempt to divert attention to practices without making this distinction, while the focus must be directed to the Act. Other "offers to prove", since the action is no longer a class action, must be read as offers to prove specific instances of unconstitutionality which cannot invalidate the statute. In short, the making of a record for which Appellants so desperately plead, will not convey to this Court any additional relevant information about the Act.

III. ACT 109 IS NOT A LAW RESPECTING AN ESTABLISHMENT OF RELIGION

All parties hereto agree that, as the court below held, *Board of Education* v. *Allen*, 392 U.S. 236 (1968), provides the test to be applied with respect to whether Act 109 violates the Establishment Clause. (Appellants' Brief, 23). Subsuming to *Allen* all relevant prior decisions under the Religion Clauses, this Court there expressed the test to be whether the challenged legislation has (a) a secular legislative purpose, and (b) a primary effect that neither advances nor inhibits religion. 392 U.S. at 243. This pragmatic test rejects any absolutist concept of church-state separation and recognizes the complex and often "competing demands" of Establishment and Free Exercise

objectives. The test has been endorsed by the Court in its recent decision in *Walz* v. *Tax Commission of the City of New York*, — U.S. —, 25 L. Ed. 2d 697, 703 (1970).

A. Act 109 Meets the Allen Test of a "Secular Legislative Purpose"

1. The Purpose of the Act Is Found on Its Face

The purposes of the General Assembly in enacting Act 109 are plainly stated on its face. These purposes unequivocally describe a secular and public legislative purpose.

The significance of a legislature's declaration was underscored in *Allen, supra,* where the Court stated:

> "The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." 392 U.S. at 243.

Similarly, the court below found the purpose of the Act to be clearly expressed within its four corners (310 F. Supp. at 45 (A91)), and thus found it unnecessary to examine the legislative history.[19]

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[19] Appellants charge that the lower court, by such refusal, "misapplied the *McGowan-Schempp-Allen* test", since, "in the original formulation of the test, Chief Justice Warren in *McGowan* specifically calls for the purpose of the legislation 'to be examined in conjunction with its legislative history'. 366 U.S. at 453." (Appellants' Brief, 29). This is an incomplete and thus misleading quotation. The full statement of the Court in *McGowan* reveals the opposite and confirms the correctness of *Allen* as followed in the lower court's opinion herein:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose—evidenced *either on the face of the legislation,* in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." 366 U.S. at 453. (Emphasis supplied).

The General Assembly, in the title of the Act, declared that Act 109 is an act "to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools", that the purpose of the Act's Fund is "to finance the purchase of secular educational services from nonpublic schools", that reimbursement under the Act is in payment "for the rendering of secular educational service", and that the Act is "to promote the welfare of the people of the Commonwealth of Pennsylvania." Under Pennsylvania law, the title of an enactment, setting forth its purposes, is legally part of such enactment. *City Stores Co.* v. *Philadelphia*, 376 Pa. 482 (1954).

The title is followed by extensive legislative findings (Section 5602). These recite the observed facts upon which the General Assembly based its judgment: the crisis in elementary and secondary education in the Commonwealth, the extensive educational burden borne by nonpublic education in Pennsylvania, and the public purposes achieved by nonpublic schools.

Appellants have not claimed the Act to be in any respect *ambiguous* (thus necessitating resort to the legislative background for purposes of clarification). Rather, Appellants ask this Court to hold that the General Assembly was guilty of deception, or sham, in falsely expressing its actual purpose in enacting the legislation. This Court has already precluded excursions into legislators' motivations:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' *McCray* v. *United States*, 195 U.S. 27, 56 . . . (1904)." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

See also, *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 224 (1949); Frankfurter, *Some Reflections on*

the Reading of Statutes, 47 Col. L. Rev. 527, 529 (1947). The court below properly rejected Appellants' attempt to involve it in a labyrinthine examination of the individual motivations of 250 legislators. See *U. S.* v. *O'Brien, supra* at 384-385.

Closely related to the foregoing is the presumption of constitutionality resting upon the principle of the separation of powers. The General Assembly of Pennsylvania and the Governor—familiar with the social needs of Pennsylvania—have enacted, and their work is presumed good, and their work does, in legal fact, represent the will of the people of that state. The burden of this litigation rests, not upon the Commonwealth, nor upon the contracting schools, but upon those who ask this Court to pronounce that the legislature and the governor of a state have acted in violation of the national constitution.

2. The Purpose of the Act Is Plainly Secular

As found in *Allen,* and declared in Act 109, the education of children undoubtedly serves a secular public purpose. The crucial public interest in education was confirmed in *Brown* v. *Board of Education,* 347 U.S. 483 (1954):

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493.

The Supreme Court, in *Allen,* reaffirming its long held view that nonpublic schools, including religiously affiliated schools, serve public purposes (citing *Pierce* v. *Society of*

Sisters, 268 U.S. 510 (1925), and *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930)) stated:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience . . . Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. *This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.*" 392 U.S. at 248. (Emphasis supplied).

Indeed, were the foregoing not true, no state could justify its qualifying of nonpublic schools as satisfying the requirements of compulsory education laws.

The four subject areas (Mathematics, Modern Foreign Languages, Physical Science and Physical Education) covered by the Act are plainly areas of vital importance in the educating of young people today. They are required by the Pennsylvania State Board of Education. Their priority has been recognized at the national level in the National Defense Education Act and by general consensus of educators.[20]

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[20] See, *Regulations of the State Board of Education of Pennsylvania*, Chapter 7, General Curriculum Regulations, March 14, 1969, Sections 7-211, 7-232, 7-233; National Defense Education Act, 20 U.S.C. 401 *et seq.* (1958). See also, CONANT, THE AMERICAN HIGH SCHOOL TODAY, 47, 69-71; RICKOVER, EDUCATION AND FREEDOM, 154; IMPERATIVES IN EDUCATION, Amer. Assn. of School Administrators, 167; DONOGHUE, FOREIGN LANGUAGES AND THE SCHOOLS: A BOOK OF READINGS, 6; The Society of State Directors of Health, Physical Education and Recreation, "The School Programs in Health, Physical Education and Recreation—A Statement of Basic Beliefs"; FEHR, *Mathematical Education for a Scientific, Technological, and Industrial Society*, in MATHEMATICS TEACHER, Nov., 1968, 665.

To claim that the Commonwealth of Pennsylvania could not honestly undertake to advance "the task of secular education" for such a large portion of its children in nonpublic schools by statutes such as Act 109 is to ignore reality, the face of the statute, and the declarations of the Commonwealth's executive officers.[21]

Appellants and their *amici* imply that the term, "purpose", as employed in the *Allen* test, means the purposes, or motivations, of those who have founded and maintained religiously affiliated schools. (Appellants' Brief, 22).[22] But it is the intent of the legislature to which

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[21] In signing Act 109 into law the Governor of Pennsylvania declared:

> "The modern challenges of education, rising costs and other economic problems are placing enormous burdens on our entire system of education—public and nonpublic; higher and elementary and secondary.
>
> "As a society we have a responsibility to help all in our education system meet these challenges within the principles of our constitutional government. We are doing that with this new law." News Information Release, Governor's Office, Commonwealth of Pennsylvania, June 19, 1968.

The chief educational officer of the Commonwealth similarly declared:

> "I regard this legislation as squarely in the public welfare interest because it plainly serves to advance the education of youngsters in this State. As you know, it provides State financial aid to education by the purchase, by the Commonwealth, of secular educational services from nonpublic—including religiously affiliated—schools." Dr. David H. Kurtzman, Superintendent of Education of the Commonwealth. See News Release, Department of Public Instruction, Commonwealth of Pennsylvania, November 8, 1968.

[22] See also, Brief *Amicus Curiae* of American Jewish Committee, American Jewish Congress, *et al.*, 10-14. This brief is almost a verbatim reprint of that which the same organizations filed in *Allen*. The chief arguments which it makes with respect to purposes of parochial schools were thus before the Court in that case.

the test refers and not the subjective motivations of citizens who support such schools.

The same misapplication of the purpose test was also raised, and rejected, in *Allen*. There the Court recognized that the New York act covered "religious", "sectarian", "parochial" schools (392 U.S. 236, 345). It nevertheless held that the New York act had a secular legislative purpose.

B. Act 109 Meets the Allen Requirement of Having No Primary Effect That Advances Religion

1. Act 109 Does Not Advance Religion—Primarily or Otherwise

To void a statute on its face, a court must find an "inevitable" or "necessary" unconstitutional effect which is dictated by the "scope and operation" of the statutory text. *United States* v. *O'Brien*, 391 U.S. 367, 385 (1968); *Board of Education* v. *Allen, supra*, at 243. This inevitable effect under the Establishment Clause must be "primary" and one that "advances" religion. The commonly accepted meaning of "primary" is *"first in importance", "chief", "principal"*,[23] while that of "advance" is *"promote", "increase", "move forward", "improve", "further"*.[24] It is plain that the necessary scope and operation of the test of Act 109 has no inevitable primary effect that advances religion.

The precedent cases decided by this Court which treat the issue of unconstitutional effects under the Establishment Clause fall into two groups. The first group involves state sponsorship of distinctly religious exercises or religion classes in public schools. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), *Engel* v. *Vitale*, 370 U.S.

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[23] American College Dictionary, 961 (1967); Webster's Third New International Dictionary, 1800 (1961).

[24] American College Dictionary, 18 (1967); Webster's Third New International Dictionary, 30 (1961).

421 (1962), *School District of Abington Twp.* v. *Schempp,* 374 U.S. 203 (1963). Similar results obtained in cases of state action implying or requiring support of traditional religious belief. *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

The second group of cases pertains directly to the issue of government aid to secular functions of church-related institutions, and are instructive and apposite to the issue of primary statutory effect in the case at bar. *Cochran* v. *Louisiana State Board of Education, supra, Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *Board of Education* v. *Allen, supra. Cochran* held that a state program of furnishing, with public funds, secular textbooks for use in nonpublic (including religiously affiliated) schools served a public purpose, and had no unconstitutional effect in aid of such schools. The Supreme Court examined the "operation and effect of the legislation" (*Cochran, supra,* at 374). Pointing to the religious character of the schools and the sectarian function carried out therein, it nevertheless held that the statute in question had the effect of benefiting the public:

> "The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children . . ." *Id.* at 375.

Everson involved a challenge, under the Due Process Clause, to a New Jersey statute which authorized bus transportation of parochial school children at public expense. The challenge was on two grounds: that the statute served a private purpose and also that it promoted an establish-

ment of religion. As to the first, *Everson*, like *Cochran*, upheld the statute as serving a public purpose, with the following observation:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran* v. *Louisiana State Bd. of Education*, 281 U.S. 370 . . ." *Everson, supra*, at 7.

The Court went on to rule that the effect of the statute was not to violate the Establishment Clause, even though it recognized that, under the bus program, "children are helped to get to church schools" and that

> "There is even the possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares . . . when transportation to a public school would have been paid for by the State." 330 U.S. at 17.

Allen squarely posed the question whether state aid directly to the educational processes afforded by parochial schools violates the Establishment Clause. Challenged in *Allen* was a New York statute requiring local public school authorities to lend secular textbooks free of charge to, *inter alia*, students attending religiously affiliated schools. The plaintiffs in *Allen* attacked the New York law as having a primary effect that advances religion because the statute "authorizes and permits the use of public moneys in aid and maintenance of religious schools." (Complaint, *Allen*, Appendix 6a). This program required state financing in the amount of $5,093,000. for the year 1967-68.[25]

As in *Cochran* and *Everson*, the Court found no primary or necessary effect advancing religion. In support of its finding that the New York act had a primary secular effect, the Court declared:

> "'[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided

[25] See *State Aid for Elementary and Secondary Education in New York*, 1966-67,44.

only as the common interest is safeguarded.'" (Quoting from *Cochran, supra,* at 375). *Allen, supra,* at 247.

Allen, like *Cochran* and *Everson,* stressed that it is the character of the function aided and not that of the institution in which the function is performed, which is determinative of primary effect. Upholding the statute as aid to a secular educational function, the Court stated that it

> "... has long recognized that religious schools pursue two goals, religious instruction and *secular* education. .... A premise of this holding [*Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925)] was the view that the State's interest in education would be served sufficiently by reliance on the *secular teaching* that accompanied religious training in the schools maintained by the Society of Sisters ... [I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their *secular educational function.*" (Emphasis supplied). *Id.* at 244-247.

> "This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." *Id.* at 248.

As in *Cochran* and *Everson,* the Court in *Allen* recognized that the secular benefits of the New York statute might "make it more likely that some children choose to attend a sectarian school", (*Id.* at 244) but deemed that consequence not to be constitutionally controlling.

Since the *Allen* case deals with the "primary effect" of the New York law, it is pertinent to compare that law with the Pennsylvania Act here in question. Such a comparison reveals that Pennsylvania's Act 109 even more clearly falls within the ambit of primary secular effect as expounded in *Allen.* Act 109 is confined to four patently non-value related subjects; the New York law contained no such restriction. Act 109 expressly prohibits the intro-

duction of religious content or instruction in the aided subjects; the New York law contained no such restriction.[26] Act 109 goes far beyond the New York law in assuring[27] the achievement of purely secular objectives through its requirements of standardized state testing and teacher qualification in the aided subjects.

Walz v. *Tax Commission, supra,* reinforces and amplifies this Court's *Cochran-Everson-Allen* teaching as applied to Act 109. It is not directly controlling here because it dealt with tax exemption of places of worship and not state aid to secular functions of church-related social agencies.

Nevertheless, *Walz* expressly confirmed the test and rationale of *Allen:*

> "Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. Board of Education v. Allen, 392 U.S. 236 (1968). In so doing the Court was heeding

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[26] The sole restriction was found in Opinion of Counsel No. 181 of the University of the State of New York, Section 6:

> "a. The textbooks be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority), and
>
> "b. The textbook has been designated for use in any public elementary or secondary schools of the State or * * * approved by any school board."

[27] The arrangement traditionally employed by the Commonwealth of Pennsylvania to support the rendering of secular services by church-related institutions, namely, reimbursement for services rendered (shorthandedly referred to as "purchase of services") has been found widely useful. This arrangement however, is merely one of several possible techniques to safeguard the public interest. The purchase of service feature of Act 109 is not constitutionally critical or determinative of the issue of "primary effect". Clearly, Act 109 would be constitutional if it used other equally satisfactory arrangements, as was the case with the New York law upheld in *Allen.*

both its own prior holdings and our religious tradition." *Id.* at 703.

It cannot be denied that Act 109 has no primary effect that advances religion.

C. The Appellants' Contentions

All of the Appellants' contentions in this case rest squarely upon one foundation premise, and these contentions must stand or fall exclusively on that premise. The central thesis, of which all other points are but variations, is that all church-related schools must be deemed *solely* "religious enterprises" or *solely* "religious institutions" --as a fixed proposition of constitutional law—and that, therefore, no function of such schools may be publicly aided. Once the "religious enterprise" view of church-related schools is accepted, it makes no difference in what incident of church relationship it finds expression—whether, for example, in sponsorship by a church or religious group, or the religious motivations of supporters, or religious "atmosphere" in a school, or the providing of religious along with secular education.[28] As a universal proposition, the "religious enterprise" theory arises from the *sole fact* of church relationship, without reference to contingencies of how church-related schools may vary in their attitudes and practices in pursuit of their dual functions.

Once Appellants' generalization of an inseparably "religious enterprise" falls, all of their satellite arguments follow it. For if, as a matter of law, government may aid secular functions of church-related schools (and other social service institutions), it cannot be said to be preferring one religion over another, or using "essentially" religious means to further secular ends, or involving the state in entanglements with "religion". Nor can the confinement of aid to the secular function justify any claim of

[28] See Appellants' Summary of Argument (Appellants' Brief, 13, 14) and also Appellants' Brief, 4, 5, 9, 18, 20, 22, 23, 26 and 27).

"divisiveness" since equality before the law in the enjoyment of civil secular benefits cannot be attacked with justification.

The delusive simplicity of the "religious enterprise" theory has not found favor with this Court, or even with a predominance of the commentators.[29] The theory ill measures the complex foundations of our established educational pluralism, and presents no workable framework for our social needs. See MEIKLEJOHN, *Educational Cooperation Between Church and State*, 14 Law & Contemp. Prob. 61, at 71, 72 (Winter 1949). Its essential vice is that it would classify church-related schools as churches, and thereby practically place such schools and their students beyond the pale of public interest.

This Court has repeatedly refused to outlaw from public concern and benefits such students "because of their faith or lack of it". A necessary corollary has been the Court's refusal to accept overstated, blanket classifications of multiple-function institutions which serve the welfare of citizens. In looking to the function primarily served, this

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[29] *Compare* Giannella, *Religious Liberty, Non-Establishment and Doctrinal Development*, Part II, 81 HARV. L. REV. 513 (1960); Freund, *Pubic Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969) *with* Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 200, 313 (1968); Testimony of M. DeWolfe Howe before Congress, in Constitutionality of Federal Aid to Education in Its Various Aspects, Senate Document 29, 87th Cong., 1st Sess., 50 (1961); Hutchins, *The Future of the Wall*, THE WALL BETWEEN CHURCH AND STATE (Oaks ed.) 17, 22, 25 (1963); Kauper, RELIGION AND THE CONSTITUTION, 112, 113 (1964); Katz, RELIGION AND AMERICAN CONSTITUTIONS, 73-75 (1964); Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 LAND AND WATER LAW REVIEW, 475, 493, 494 (1966); Landynski, *Governmental Aid to Nonpublic Schools*, 36 SOCIAL RESEARCH, 333, 350, 353 (1969); Schwarz, *Religious Liberty, Non-Establishment and Doctrinal Development—a Reply to Professor Giannella*, 81 HARV. L. REV. 513 (1968); Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 VA. L. REV. 579, 599 (1969).

Court has refused to indulge any such absolutist constitutional outlawry that would smother voluntarism and the very religious liberty objectives that underly the First Amendment. Carrying forward its prior authorities, the latest Establishment Clause decision confirms the foregoing analysis:

> "The sweep of the absolute prohibitions in the Religion Clauses . . . was to state an objective, not to write a statute." *Walz* v. *Tax Commission, supra,* 25 L. Ed. 2d 701 (1970).

> "The course of constitutional neutrality . . . cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions . . ." *Id.* at 701-702.

Thus short of the clear extremes

> ". . . There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* 702.

In line with these observations, it is clear that the "religious enterprise" theory would be no more desirable if applied to church-related schools than it would be if applied to other church-related social service institutions. It would, in its practical effect, set government against religion and paralyze the power of both government and religion to serve their common constituents in the areas of their "concurrence of function." See Jacob W. Landynski, *Government Aid to Nonpublic Schools,* 36 Social Research No. 3, 333 at 344, 345 (Autumn 1969).

I. Does Church Relationship Disqualify a School From State Assistance to Its Secular Educational Function?

Appellants assert that Act 109 violates the Establishment Clause because it causes tax moneys to be paid "directly" into a "church institution's treasury" (Appellants' Brief, 27, also *passim*). Despite the applicable decisions of this

Court, Appellants continue to press their interpretation of the meaning of the *Everson* case as holding that "no-aid" may be afforded to education in church-related schools. That view is clearly discredited by *Board of Education* v. *Allen, supra,* at 243. Further, the contention that governmental action may not, however indirectly, lighten the economic burden of churches or their related institutions, was patently repudiated by this Court's decision in *Walz*. The Court there acknowledged the economic relief flowing to churches from tax exemption but did not deem such an aid to religion to be in violation of the Establishment Clause. The appellant in *Walz* also argued that economic relief from taxes to churches aided religion by "freeing up funds" for other church uses. In connection with this contention and specifically with respect to educational aid, this Court said:

> "Similarly, making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. *Board of Education* v. *Allen*, 392 U.S. 236 . . . (1968)." —— U.S. ——, 25 L. Ed. 697, 703 (1970).

Thus the court below properly rejected the test of whether educational aid is channeled to the student or directly to the servicing school as the basis for determining the Establishment issue:

> "Such an approach would place form over substance . . . The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers . . . The use to which the funds are put must be the primary concern." 310 F. Supp. 47, 48 (A97).

The fallacy of Appellants' argument, that aid to any function, however secular, of a church-related institution must be deemed an unconstitutional aid to religion, is obvious when viewed against the precedents of myriad federal and state programs in support of secular services by direct payment to denominational orphanages, protectories for wayward or needful children, colleges, hospitals, and homes for the aged. Many of these "religious institutions" provide, and are reimbursed for, educational as well as general health care services. Were the fact of church relationship and of direct payment to such institutions constitutionally controlling, as Appellants insist, all such practices surely could not have survived to this day.

Appellants seek to caricature Act 109 as a "facade" "to confer . . . varying amounts of public funds on private and religious institutions for doing what they are already doing." (Appellants' Brief, 31, 32). Long before Act 109 was enacted, Pennsylvania had adopted a series of statutes which implemented the same statutory pattern employed in Act 109.

Going back as far as 1929, Pennsylvania has consistently employed purchase of service contract procedures to reimburse church-related institutions for all manner of child-welfare services, including education in church-related orphanages and protectories. See, *e.g.*, Act of April 19, 1929, P.L. 177, 71 Pa. Stat. Ann. § 611.9 (repealed 1967); Act 21 of 1967, §§ 201, 901, 62 Pa. Stat. Ann. §§ 206, 901; Pennsylvania Department of Welfare, Office of Family Services—Title 3100 Regulations—Voluntary Child Welfare Agencies. More recently, the state extended its established pattern of welfare distributions, in disbursement of federal and state medicare funds, by a statute and purchase of services contract administration that are remarkably similar to those employed under Act 109. See Act 21 of 1967, § 901, 62 Pa. Stat. Ann. § 443, as amended, Act 273 of 1967, § 5, 62 Pa. Stat. Ann. § 443.1 (supp.).

No one would seriously contend that the Commonwealth's power to make reimbursement for medical services depends upon the *form* (whether by contract or otherwise) through which such reimbursement is made. It is also useful to note that massive use is made of the contract reimbursement pattern for distribution of public interest funds under many federal, as well as state, laws. See, *e.g.*, the listing of federal education, training, research and other welfare laws in Supplement B, Part 1 of this brief.

Thus Appellants not only misconceive Pennsylvania tradition and law (see *e.g.*, *Schade* v. *Allegheny County Inst. Dist.*, 386 Pa. 507 (1956)) but they also mistakenly make formal methods the test of constitutionality.

The charge that Act 109 requires church-related schools to do nothing more than they were already required to do is both factually false and legally irrelevant. In the absence of necessary economic resources, a given church-related school today may not be able to continue educating children; hence state support of its secular educational function may well enable it to perform public services which otherwise it could not. Further, the fact of social commitment of a school or orphanage to provide education or care is irrelevant to the state's constitutional power to encourage and support such activities in the interest of its citizens. The only true test is whether a statute has a secular purpose and primary effect that does not advance religion.

Similar responses may be made to Appellants' allusions to the use of a "contract" procedure under Act 109.[30] As in all purchase of service arrangements, the

[30] It is assumed that Appellants do not seriously press the disposition of this appeal on contract principles. Pennsylvania law requires only that the promisor suffer a "trifling inconvenience", to support a binding promise (*Mikos* v. *Kida*, 314 Pa. 561, 172 A. 101 (1934); *York Metal & Alloys Co.* v. *Cyclops Steel Co.*, 280 Pa.

significance of the "contract" is not, as Appellants insist, to provide a constitutional justification for such support, but only to assure proper performance by the reimbursed agency, pursuant to state standards. The validity of the Act itself turns not upon the form of the arrangement, but upon the grounds laid down by the Supreme Court in *Cochran-Everson-Allen.*

In their zeal to condemn Act 109, Appellants lose sight of the true public interest features of the statutory scheme, namely, the avoidance of outright gift or subsidy to the institution providing the service. By requiring a measurable *quid-pro-quo,* the statute precludes any handout, and insures limitation of the institutional role to that of a service conduit, as distinguished from the true and ultimate beneficiaries of secular education.

2. Does Act 109 Authorize Blending Sectarian and Secular Instruction?

The Appellants complain that Act 109 "finances and participates in the blending of sectarian and secular instruction" (Complaint, ¶ 18 (A15)), contending that, in a parochial school, no demarcation between the religious and the secular is possible. (Appellants' Brief, 45). This they assert in spite of the express prohibitions in the Act which make non-reimbursable the cost of any instruc-

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385, 124 A. 752 (1924); *Stearns* v. *Targe,* 34 D. & C. 2d 399, 52 Del. Co. 96 (1964). The benefit to the Commonwealth and the detriment to the participating schools is: the Act's requiring the use of non-sectarian books, the testing requirements for their students and the promise to hire teachers possessing the qualifications required for certification by the Commonwealth. Moreover, Pennsylvania courts have repeatedly sustained contracts in which a party rendering services to another voluntarily can enforce an express promise made by the recipient of the services that they shall be paid for if the services are continued. See *e.g., Sutch's Estate,* 201 Pa. 305, 50 A. 943 (1901); *Currey's Estate,* 26 Pa. Super. 479 (1904); *Pohl's Estate,* 136 Pa. Super. 91, 7 A. 2d 14 (1939).

tion which would "include any subject matter expressing religious teaching, or the morals or forms of worship of any sect". (Section 5603(3)). Appellants' contention thus amounts to the charge that public administrators and parochial school teachers—whether lay or religious—cannot be trusted to observe the statutory limitation.[31]

These same contentions were before this Court in *Allen*. The plaintiffs there argued: "There is no such thing as secular education in a sectarian school. The whole curriculum is permeated by religion". (Brief for Appellants, New York Civil Liberties Union of counsel (*Allen*), 16). The Court in *Allen* rejected this "inevitable religious permeation" argument. Basing itself on America's "background of judgment and experience" with respect to private and parochial schools, and with express reference not merely to textbooks but to instruction, the Court refused to take judicial notice—and thus to impose an irrebuttable presumption of law—"that all teaching in a sectarian school is religious". 392 U.S. at 247-248. It recognized that parochial schools perform *secular* functions—which it expressly distinguished from their sectarian functions. *Id.* at 248. The Court flatly discountenanced the view that, although a statute limits benefits to secular functions, administrators and teachers will perforce violate

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[31] See, *e.g.*, the warning by one group of *amici curiae*, which implies not merely dishonesty on the part of those who administer the statute and those who teach in parochial schools but paints a crudely false caricature both of the modern education there afforded as well as the Act: "How can there be assurance that a teacher, teaching mathematics in a Catholic parochial school will not use . . . rosary beads for teaching counting? Similarly, how can the state be assured that the teacher of modern Hebrew in a Jewish day school in Pennsylvania does not include some reference to Jewish 'forms of worship' precluded by the Act?" Brief of *Amici Curiae*, American Jewish Committee, American Jewish Congress, *et al.*, 28.

the statute, or the legal obligation imposed by Paragraph 1 of the contract:[32]

> "Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." *Id.* at 245.

The court below correctly followed the teaching of *Allen* on these questions. 310 F. Supp. at 46-47 (A95).

It bears stressing that Appellants here attack the Act on its face. Should any violation of the Act occur through misapplication, the Commonwealth and the courts are not without power to deal with it. But no instance of misapplication is raised by this action.

Finally, Appellants' argument ignores the realities of contemporary education. Society, as well as parents of parochial school children, demand that that schooling be geared, without quality differentiation, to general educational standards. These contemporary demands relating to class time requirements and notoriously mounting pressures for academic excellence do not permit church-related schools to be eccentric schools of religiosity as they are caricatured by Appellants and their supporting *amici*. The influence of standardized testing is pervasive.

Appellants attempt to make much of the "atmosphere" of church-related schools, citing their physical proximity to churches, their architecture and religious furnishings. These obvious facts were assumed by this Court in *Allen*, where the Court acknowledged that students in church-related schools receive instruction in religion in addition to instruction in secular courses. See, CHOPER, *The Estab-*

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[32] The contract form is contained in *Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act*, 11.

lishment Clause and Aid to Parochial Schools, 56 Calif. L. Rev. 260, 297, 298 (1968).

3. Does Act 109 Prefer One Religion Over Another?

Appellants attack the Act as preferring "one religion over another or, at most, two or three religions over all others." (Appellants' Brief, 36). The Complaint, however, in no way alleges preference of one religion over another. Nor do Appellants point to any language of the Act which would create such a preference. The Act contains no such language. Rather, it applies equally to all nonpublic schools, religious or otherwise:

> "'Nonpublic school' shall mean any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law." 24 Pa. Stat. Ann. § 5603(4).

Appellants' attack arises solely from the fact that most of the participating nonpublic schools are religiously affiliated, and that most of these are Catholic. This is admitted but irrelevant. The test of nonpreference of religion is to be found in the fairness and neutrality of the classification of a statute's coverage. See *Walz* v. *Tax Commission*, *supra*, 25 L. Ed. 2d 697, 703, 717, 718 (1970). Thus in *Walz*, the fact that the economic relief from tax exemptions incidentally redounded to greater savings to those religions which owned churches of far greater value than the majority of sects did not, in law, amount to an unconstitutional preference of any one religion. Similarly in *Allen*, where the Court could well assume that the Catholic parochial schools and students would, by reason of their predominant numbers, receive the major portion of the statutory benefit. Finally, in *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963), this Court flatly rejected the contention that the exemption of Sabbatarians from unemployment compensation laws would be a preference for

their religion by the state, so as to constitute an establishment of religion. Absent any invidious discrimination among religions by the statutory terms, the claim of preference of religion is clearly without foundation in the law.

The court below, quoting *Everson*, properly stated:

> "'The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason * * * to say that a legislature has erroneously appraised the public need.'" 310 F. Supp. at 45.

Act 109 does not select any group as its favored object; *citizens*—most but not all of them Catholic—have selected parochial schools in which to educate their children. This choice has always been available to all Pennsylvanians willing to make the sacrifices necessary to build and operate independent schools meeting state requirements. This choice was not made by supporters of parochial schools in derogation of their legal duty to pay taxes for the total support of those schools which the majority—in like exercise of their conscience—desired for their children.

4. Does Act 109 Use Essentially Religious Means To Serve Secular Ends?

Appellants argue that Act 109 uses "religious means to serve secular ends", citing the *Torcaso* and *McGowan* cases, without indicating how those decisions substantiate their claim. (Appellants' Brief, 39). Their apparent reliance upon a quotation from the concurring opinion of Mr. Justice Brennan in the *Schempp* case that "government may not employ religious means to serve secular interests . . ." (*Ibid.*) is not justified by the full text and context of Mr. Justice Brennan's opinion. In that opinion, Mr. Justice Brennan very meticulously and repeatedly modified the phrase "religious means" by use of the word *"essentially"* (*Id.* at 294, 295), thus making clear that it is government's employment of religion as

such, and not of the secular functions of church-related institutions, which is prohibited by the Establishment Clause. If any doubt concerning this reading of *Schempp* ever existed it was set to rest by this Court's decision in *Allen* to that effect and Mr. Justice Brennan's joinder in the opinion of the Court in *Allen*. Finally, Mr. Justice Brennan, himself, clearly laid to rest the Appellants' unwarranted interpretation of his opinion in *Schempp* by his elaboration thereof in *Walz*. In specific explication of the term, "use essentially religious means to serve governmental ends", he pointedly stated:

> "The means churches use to carry on their public service activities are not 'essentially religious' in nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities." *Walz, supra,* at 715.

> "First, these organizations are exempted because they, among a range of other private, nonprofit organizations *contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone to the detriment of the community.*" *Walz, supra,* at 712. (Emphasis supplied).

Indeed the majority opinions in *Walz* make clear that the Appellants' overblown version of the "religious means" aspect of the purpose and effect test is untenable. Thus, as a matter of law as well as common sense, only an absurd construction of the term, "essentially religious means", can make it applicable to the secularly rendered instruction in Mathematics, Modern Foreign Languages, Physical Science, and Physical Education supported under Act 109.

5. Does Act 109 Create an Excessive Interdependence Between the State and Churches?

Appellants broadly argue that this Court has held the Establishment Clause to forbid interdependence between religious institutions and the state, without making clear what they mean by "interdependence". At one point, they refer to any "working arrangement between [church and state]" (Appellants' Brief, 40); at another point they say that the degree of interdependence must be so great as to have "threatened the freedom of each" (*Ibid.*); at another, they invoke Mr. Justice Rutledge's belief that the furnishing of bus transportation to parochial school children involved unconstitutional interdependence (*Id.* at 41), although this Court rejected that conclusion.

It is clear that this Court's references to "interdependence" (and "involvement" and "entanglement") are not intended to include all administrative relationships between religious institutions and the state. *Walz, supra,* 25 L. Ed. 2d at 703. The Court has stressed that not mere "involvement" but "excessive" involvement is constitutionally prohibited; not mere "entanglement" but "impermissible" entanglement. *Walz, supra,* at 705. Constitutionally, "interdependence" is significant only in terms of whether its primary effect is to advance or inhibit religion. Appellants argue that Act 109 creates an unlawful interdependence because (a) it promotes "divisiveness" and "controversy" (b) it produces "entanglements" which threaten or invade the religious liberty of institutions.

(a) The "divisiveness and controversy" argument.

This Court has not isolated religion or education as objects concerning which public discussion ought not to be had:

> "Adherents of particular faiths and individual churches frequently take strong positions on public

> issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz, supra,* at 702.

It is obvious that the Establishment Clause is not to be read as a suppressant of religious difference. The plain implication of Appellants' novel "divisiveness and controversy" doctrine amounts, however, to just that. The inescapable meaning is that a statute aiding the secular education of children in parochial schools is void because it may occasion future public disputes by persons who oppose such aid.[32a]

Since disputes can also arise over the tax exemption, not only of places of worship (*Walz* was itself one such dispute), but also over tax exemption or church-related hospitals, colleges, schools, homes for the aged, or the properties of Ethical Culture societies, the tax exemption of these, too, would necessarily amount to that sort of "involvement" which (under Appellants' reasoning) it is the business of the Establishment Clause to prevent. So also with the draft exemption, or the clerical exemption in the Social Security Act.

Under this branch of Appellants' test, in order to find out whether a statute violates the Establishment Clause, a court should apparently first make up its mind as to whether anybody will oppose the enactment or operation of the statute and, if it guesses that there will be opposition, then it must further guess how much. This is an open invitation to those who oppose, let us say, state purchase of useful secular educational services for parochial school children, to *make controversy,* indeed to make

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[32a] To the same effect is the recent decision in *DiCenso* v. *Robinson,* — F. Supp. — (D.C., R.I., 1970), reflecting a total misreading of this Court's opinion in *Walz.* This may be compared with *Tilton* v. *Finch,* — F. Supp. — (D.C., Conn., 1970) which upheld, over Establishment Clause objection, federal grants to sectarian colleges under a statute embracing detailed and long term relationships with government. See 20 U.S.C. §§ 701, 754.

a *religious* issue of the matter, now realizing that the more virulent is their campaign, the more fully is the "divisiveness and controversy" test met. Thus, the appearance of peaceableness in this test vanishes and its true face is seen, as a test which incites embroilment.

Under this test, considerations of *law* also vanish. The New York educational program for children, upheld by the Supreme Court, would likely have been terminated and its benefits to young citizens lost had the Appellants' test been applied. In New York, "controversy" arose as the result of the efforts of citizens to obtain this secular benefit for their children,[33] and a subjective judgment could have been rendered by the courts that the controversy was substantial. Thus, upon the basis of judges' guesswork that opponents of the program had in fact raised a violent enough hue and cry, the children in question would have been deprived of a substantial educational benefit to which, since *Allen,* we find they were constitutionally entitled. While the *Allen* test places religious majorities in states at no advantage, the Appellants' test places religious minorities everywhere at a *constitutional* disadvantage wherever their opponents decide to light the fires of conflict.

In our own time, a wide variety of federal and state programs conducted by many different religious denominations in the fields of health, welfare and education are, by Appellants' peculiar doctrine, inherently unconstitutional. But the reality is that these programs, however initially marked by controversy, were soon met with broad enthusiastic acceptance by the American people.

(b) The "entanglements" argument.

The Appellants also say that Act 109 unconstitutionally entangles religious bodies—and, in particular, parochial schools—in the tentacles of the state. The decisions of this Court do not lend them support.

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[33] See article, "Assembly Votes Textbook Loans", New York Times, May 12, 1965.

The entanglement which the Court has indicated would be unconstitutional, as having a primary effect of inhibiting religion, must be of that degree which would "*tip the balance toward government control of churches or governmental restraint on religious practice.*" *Walz, supra,* at 702. (Emphasis supplied). In making the net judgment whether that degree is present in a given relationship between government and religion, the quantitative and qualitative details of that relationship are relevant but not *per se* controlling. As the Court has made clear, the ultimate test is whether religion is being unconstitutionally compromised.

American public policy has long deemed salutary those cooperative relationships between government and voluntary organizations whereby needed public goals are achieved. In these relationships, by which government sponsors research, affords stimulation to private enterprise, or in other ways utilizes the capacity of private resources, rarely is it ventured that regulation, limited to reasonable protection of the public interest, in effect obliterates, Communizes, or oppresses the essential vitality of the private sector. Among these cooperative relationships are today a host of funded federal and state programs affecting education and welfare as administered by church-related institutions. (See Supplement B.). These programs involve necessary continuity of relationship, as well as, in many instances, state licensing of institutions and their professional staff, performance testing, supervision, accreditation, evaluation, inspection, audit, and other techniques to insure that the public gets what it pays for in terms of secular quality. These successful programs enjoy widespread approbation and are not condemned as oppressive of religion.

The constitutionality of one such program, involving the area of education, was upheld by this Court in *Allen.* There the Court pointed out:

> "Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy com-

pulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.

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". . . if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function." 392 U.S. at 246.

The Court also stated that: "New York State regulates private schools extensively", and that "A great many state cases have upheld a wide range of private school regulation." (*Id.* at 246). Such regulation applies, of course, to New York's religiously affiliated schools. Indeed the statute itself, considered in *Allen,* provided for a substantial degree of state regulation. (See full text of Opinion of Counsel No. 181, The University of the State of New York, Education Department (1966)).

In light of the foregoing, and particularly when compared with the "entanglement" found in the existing compulsory school attendance laws of all states, Act 109 cannot seriously be considered as creating a novel or unconstitutional relationship between the state and church-related schools. Nonpublic (including parochial) schools are already extensively regulated in Pennsylvania. (See Supplement C). This body of regulation, like that provided for in Act 109 itself, has been found unobjectionable by the private school administrators who, over the years, have experienced it. The Act, as noted, pertains solely to Mathematics, Modern Foreign Languages, Physical Science, and Physical Education, and not to the whole curriculum nor to the general administration of the schools. There is no involvement with the religious function.

Furthermore, the Act does not require any nonpublic school to participate under it. Any nonpublic school

is free to not participate. The fact that so large a number have elected to participate must be respected as a judgment that the Act does not result in oppression of religion. At the beginning of its third year of administration of the Act, the Commonwealth of Pennsylvania has found the program to be functioning well. (See Supplement D).

Finally, the limited "involvement" found in Act 109 must be viewed in terms of voluntarism. While voluntary agencies in education and welfare will not be able to continue to render their unique contributions to our society in the absence of a measure of public help, it is equally true that they may not expect such help without reasonable regulation limited to the specific secular function aided. Inherent in the democratic concept of enabling these agencies to pursue their "concurrence of function" is the necessity of some "interdependence", so long as it is not excessive. To characterize this fair balance of interests as "politics in religion" or "religion in politics" is to obfuscate the complexity of constitutional law. See *Walz, supra,* Harlan, J. concurring at 719.

Appellants also say that Act 109 provides "subsidy" to churches and indicate that the payments feature of the Act results in unconstitutional interdependency. Under the teaching of *Allen,* it is clear that the form of the governmental support (property, money or credit) to secular functions of church-related institutions is not constitutionally controlling. It would obviously make no sense to say that Pennsylvania would violate the Establishment Clause if it were to make a cash payment of $700 to buy cane chairs from a Methodist Home for the Blind, but that it would not violate the Establishment Clause by a free, long term loan to a sectarian college of $700,000 worth of laboratory equipment. More important, however, is the fact that Act 109 involves no subsidy: the schools use *their own money* to pay for the secular educational services rendered; only after they have rendered these services

and paid the actual cost thereof themselves does the Commonwealth (for its own declared public purposes) *replace* that money. The earnings represented by this replacement money, in exchange for services rendered, become the property of the sellers of the service, and the right of disposal thereof is no more questionable, constitutionally, than their right initially to commit funds to the support of these educational services. *Hysong* v. *Gallitzin Borough School District,* 164 Pa. 629, 656 (1894).

IV. ACT 109 IS NOT A LAW PROHIBITING THE FREE EXERCISE OF RELIGION

It is difficult to determine whether Appellants now press a claim under the Free Exercise Clause. They do not raise it in their "Questions Presented", or in their Summary of Argument, and they do not argue the issue in their brief. See Rule 40(1)(d)(2), Rules of the Supreme Court. To state a cause of action under the Free Exercise Clause, a party must allege that the law coerces him, as an individual, in the practice of his religion. Appellants, as the court below pointed out, made no allegation in their Complaint "as to what their particular religious beliefs are nor how the Education Act, by authorizing the purchase of secular educational services, coerces them in the practice of their religion." 310 F. Supp. at 48 (A99). This Court has held such an allegation indispensable to a Free Exercise cause of action. In *Allen,* in holding that the statute there considered did not violate the Free Exercise Clause, the Court stated:

> "Appellants also contend that § 701 offends the Free Exercise Clause of the First Amendment. However, 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it *operates against him in the practice of his religion'*, Abington School District v. Schempp, 374 U.S. 203, 223 . . . and appellants have not contended that the New York law in any way *coerces them as individuals in the practice of their religion.*" *Id.* at 248. (Emphasis supplied).

To like effect, see *School District of Abington Township* v. *Schempp, supra,* at 223.

The Complaint fails to allege any facts sufficient to show that, so far as the Appellants are concerned, the Act "coerces them as individuals in the practice of their religion". No facts are alleged in the Complaint stating the religious beliefs of any of the Appellants. The bald conclusion that the Act violates Appellants' consciences is not supported by any fact allegation concerning their religion, their particular religious practices, their particular religious observances, the dissemination of their particular religious views.[34]

It is manifest that the Act does not, by any feature of its language, place any restriction on the exercise of anyone's religion. It merely enables Pennsylvania to aid the secular education of children in all nonpublic schools of the state. Appellants, however, seek to derive from the face of the Act the legal conclusion that it compels the individual taxpayer to support religion. The reasoning

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[34] Research discloses no decision under the Free Exercise Clause in which the bare allegation of compulsory taxation for the support of religion has been held by the Supreme Court to state a cause of action under the Free Exercise Clause. To the contrary, the Free Exercise cases, without exception, deal with individual religious belief or with the manifestations of such belief in action. *See, e.g., Reynolds* v. *United States,* 98 U.S. 145 (1878) (practice of polygamy as requirement of personal religious belief); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Kunz* v. *New York,* 340 U.S. 290 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1952) (preaching and proselyting); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943) (solicitation of sales of religious tracts); *Follett* v. *McCormick,* 321 U.S. 573 (1944) (evangelism); *United States* v. *Ballard,* 322 U.S. 78 (1944) (use of mails to propagate individual's religious views); *Braunfeld* v. *Brown,* 366 U.S. 599 (1961) (observance of Sabbath); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Torcaso* v. *Watkins,* 367 U.S. 488 (1961) (compulsion to declare a belief).

set forth under discussion of Point III, *supra*, of this brief compels the conclusion that *Board of Education* v. *Allen* is controlling authority concerning the issue of Free Exercise in the instant case and that the Complaint does not state a cause of action respecting Free Exercise. As has been shown, the Act achieves a secular legislative purpose and has no primary effect which either advances or inhibits religion. That being so, the court below properly concluded that the Act does not invade the religious liberty of any individual.

V. NO ORGANIZATIONAL APPELLANT HAS STANDING TO BRING THIS ACTION; NO INDIVIDUAL APPELLANT HAS STANDING UNDER THE FREE EXERCISE OR EQUAL PROTECTION CLAUSES

Six organizations and three individuals (Appellants here) initiated this action. The district court ruled (without dissent): that none of the six organizational Appellants had standing to sue; that no individual Appellant had standing to sue under the Equal Protection Clause; that, of the individual Appellants, only the Appellant Lemon had standing under the Establishment[35] Clause; and (one judge dissenting) that all three individual Appellants had Free Exercise standing. Appellants attack the rulings of the court below, contending that all Appellants have standing to sue under all of the asserted causes of action.

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[35] Appellees agree with the court below, that the individual Appellants Worrell and Reardon do not have standing under the Establishment Clause. Since it is clear that the individual Appellant Lemon does have Estabishment Clause standing, Appellees elect not to present argument herein upon the lack of Establishment standing of Worrell and Reardon.

A. The Organizational Appellants Have No Standing To Bring This Action

Six organizations claim standing to sue in this case. The asserted bases for standing are:

(a) that each is "an association of persons resident in the Commonwealth of Pennsylvania"

(b) that all "carry on activities in the Eastern District of Pennsylvania"

(c) that all "share as a common objective the separation of church and state and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion"

(d) (as to Pennsylvania State Conference of NAACP), that its purpose is to seek the elimination of racial discrimination through resort to judicial proceedings "and otherwise". (Complaint, ¶ 4. A9-10).

Conspicuously, the Complaint does not allege that these organizations are taxpayers; the organizations do not sue in that capacity. The Complaint says that the organizations "carry on activities in the Eastern District of Pennsylvania", but these are not described. It speaks of the organizations' members ("persons"), but it does not say that these are taxpayers, or that they are in any way injured, or even that they are citizens, but only that "some" are "resident in the Commonwealth of Pennsylvania". Further, the Complaint does not say that the challenged Act deals in any manner with the status or operation of any of the six organizations. It fails to allege, even generally, that the income, activities, membership, or any other organizational interest of any of the organizations is injured, or threatened with injury, by virtue of the challenged statute.

Finally, the Complaint does not provide specific reference to formal purposes of the associations as undoubtedly stated in their respective charters, constitutions or by-laws, but rather is content with the general allegation that the organizations share certain "common objectives" which amount, at most, to shared ideas not actually shown to be relevant to the particular purposes or integrity of the respective organizational Appellants. These objectives pertain, in effect, to the separation of church and state and opposition to racial discrimination—sentiments not peculiar to them but shared by many individual members of the general citizenry and, indeed, by Appellees.

Flast v. *Cohen*, 392 U.S. 83 (1968), sets forth the principles which now govern standing to sue in the federal courts.[36] Measured against the law of that case, the assertions of the organizational Appellants do not spell out standing. *Flast* states that the initial point of focus, in an inquiry into standing, is the party—not the issues about which the party is talking:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his Complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.* at 99.

There are, the Court indicated, two basic questions relating, in turn, to such party: (1) whether he has

> ". . . 'a personal stake in the outcome of the controversy,' Baker v. Carr, supra . . ." *Id.* at 101.

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[36] All Appellants herein ground their actions exclusively upon the direct operation of the federal constitution. They do not rely upon standing created by special statute. Nor is their citation to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, relevant to the question. It is well established that the Act provides no independent ground for standing to sue, nor any expansion of federal jurisdiction beyond Article III limitations. The constitutional standing here sought by Appellants is governed exclusively by the principles laid down by the Supreme Court as to proper parties to invoke the Constitution to nullify legislation.

(2) ". . . whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102.

To have standing, a party must show both the "personal stake" and the "logical nexus".

The customary "personal stake" in constitutional litigation is that asserted by a taxpayer who claims that he suffers injury due to a given public expenditure. His "stake" is the loss of his tax money. The Appellant organizations do not assert this kind of stake. Neither, however, do they assert any other kind of interest which the federal courts have recognized as a "personal stake". *Cf., Baker* v. *Carr,* 369 U.S. 186 (1962) (injury to individual voting franchise), *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) (injury from imposition of statute's criminal penalty).

> "*[T]he federal courts have consistently adhered to one major proposition, without exception: One who has no interest of his own at stake always lacks standing.*" Davis, *Standing: Taxpayers and Others,* 35 U. of Chi. L. Rev. 601, 617 (1968). (Emphasis by author).

As has been seen, Appellant organizations fail to assert any interest of their "own". The supposed "interest" is not a "stake" but an outlook, and is not "personal" to the organizations but widely shared.

Neither does there appear any logical nexus between the status asserted by these organizations and the claims sought to be adjudicated. Their status (not that of taxpayer) they describe as that of groups carrying on activities and sharing certain ideas and goals. It is such "status" that they seek to connect to the three claims they assert relating to the Equal Protection, Free Exercise, and Establishment Clauses. But if in fact the Act violates these clauses, or any one of them, the Appellant organizations fail to show any logical nexus between their

status *as organizations* and violations of these clauses. They do not show that the Act results in denial to them of equal protection, whether through invidious classification or other discrimination. Nor do they show that it violates the free exercise of religion by these associations. They fail to describe any practice, exercise or other expression of religious belief upon which the Act impinges. Appellants likewise fail to connect their status as organizations-with-objectives to any effect of the Act in establishing religion.

While Appellants do not brief the question which they raise respecting standing of the organizations, it is apparent that their claim of standing must rest either on the "private attorney general" theory [37] or else upon a misapplication of the doctrine of *jus tertii*. The former theory has not found acceptance by this Court. As to the latter, the organizational Appellants do not sue upon the basis of injury which members thereof claim they sustain or are threatened with, as individuals, by reason of the Act. There is no allegation that the members of any organizational Appellant are unable or disabled to assert their personal grievances independently of such association. The Court has repeatedly upheld the general principle that a litigant will not be permitted to achieve *plaintiff* standing by asserting the rights of third parties. *Tileston* v. *Ullman*, 318 U.S. 44 (1942); *Doremus* v. *Board of Education*, 342 U.S. 429 (1952); see particularly *Flast* v. *Cohen, supra*, p. 99, n. 20. The only departures from this rule, which are not truly exceptions, are cases which apply to the standing

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[37] The theory is actually not one of standing to sue but, in effect, of suing to stand. Applicable to the organizational Appellants is the comment of one court: "'*Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute.*'" *Doremus* v. *Board of Education*, 342 U.S. 429, 431 (1952) (quoting, on appeal, the Supreme Court of New Jersey in the same case). (Emphasis supplied).

of *defendant* parties to raise defenses based upon third party rights. Those cases do not create initial jurisdiction at the instance of a corporate plaintiff. Even in the latter cases, standing to raise *jus tertii* by way of defense is permitted only as a rule of necessity and in certain "unique" situations. See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Gibson* v. *Florida Legis. Investigation Comm.*, 372 U.S. 539 (1963); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Pierce* v. *Soc. of Sisters*, 268 U.S. 510 (1925). The cited *NAACP* case, and *Barrows* and *Griswold*, noted the consistency in rationale between the general rule of *Tileston*, and the special rules in the specified exceptional situations. In the case at bar there are no exceptional circumstances to convert the *jus tertii* defense rule to a rule of plaintiff standing.

In conclusion, it is clear that the lower court was correct in ruling that no organizational Appellant has standing to sue in this action.

B. No Individual Appellant Has Standing Under the Free Exercise or Equal Protection Clauses

The district court held (one judge dissenting) that all three individual Appellants have standing to sue under the Free Exercise Clause, and (unanimously) that no Appellant has standing under the Equal Protection Clause. Appellants assert that all individual Appellants have standing under both clauses.

1. Free Exercise

While Appellees deem the issue of Free Exercise standing to be not central to this appeal, they must deny that the Complaint gives basis for any such claim of standing. Of the three individual Appellants, only the Appellant Lemon can (by virtue of his having contributed to the fund administered under the Act) claim an economic injury.

But this Court has held that a bare economic interest is insufficient to confer Free Exercise standing. In *McGowan v. Maryland*, 366 U.S. 420 (1961), the employees of a department store, convicted of violation of Maryland Sunday laws, asked the Court to rule that those laws violated, *inter alia*, the Free Exercise Clause. The Court, holding that they lacked Free Exercise standing, stated:

> "But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' *religious beliefs* are." *Id.* at 429. (Emphasis supplied).

The individual Appellants, in the case at bar, do not allege any injury in fact to the practice of their particular religion. They do not state what, if any, manifestation, expression, exercise or practice of the religion of one, some, or all of them is operated against by the Act. In fine, since they have chosen to assert nothing respecting their religion, it is impossible to derive from the Complaint any basis whatever for their claim of standing to sue on Free Exercise grounds.

2. Equal Protection

The court below unanimously held that none of the Appellants have standing to sue under the Equal Protection Clause. On this Appeal, Appellants, under "Questions Presented", raise the issue of Equal Protection standing of all three individual Appellants but present argument in their Brief only with respect to the Appellant Lemon. (Appellants' Brief, 4, 48).

The allegations made in the Complaint, with respect to the Appellant Lemon, whose child attends a public school, do not satisfy the essential element that the Appellants allege that Lemon, or his child, thus personally suffered an Equal Protection injury by reason of de facto segregation

in the Appellee Schools (or in any school). There is no allegation that Lemon or his child sought or was denied admission to one of the Appellee Schools (or any other school), or even that they are denied such an opportunity by reason of de facto residential and school location patterns or practices. Absent any injury to his rights, Lemon has no standing to invoke the Equal Protection claim:

> "The Supreme Court has declared that the equal protection clause confers individual rights rather than group rights to equality. As a constitutional principle this generally means that equality of treatment must be measured as between individuals." See, Note—DEVELOPMENTS—EQUAL PROTECTION, 82 Harv. L. Rev. 1065 at 1111-1112 (1969) and cases therein cited.

The fact that the Appellant Lemon is a Negro does not, without more, entitle him to bring suit as a private attorney general on behalf of hypothetical third party Negroes who might, conceivably, be exposed to invidious discrimination in violation of the Equal Protection Clause. There is no more magic in color than in taxpayer status in conferring standing to sue. Race indeed is relevant to Equal Protection issues, but a Negro must still have a personal stake in the outcome of the controversy in order to satisfy the standing requirements of the federal constitution.

Should Lemon take the frontier position that Negro parents of public school children may complain of de facto racial segregation in private schools, because such de facto segregation aggravates racial imbalance in public schools to the injury of Negro public school children (and assuming, as we must for the purposes of this argument, that such a position is tenable as a matter of substantive law) he would still, under his Complaint, fail to establish standing to sue under the Equal Protection Clause. For one thing, the Complaint does not show that Lemon's child is in a racially imbalanced school, or is in any way threatened by racial imbalance in his public school. The Complaint

does not even reveal the school or grade level of Lemon's child. This bears directly upon any theoretical injury to which he might be exposed. Further the Complaint does not show how, or to what extent, any theoretical injury to Lemon's child would be cured by the denial to the State of the purchase of secular educational service from nonpublic schools for the benefit of nonpublic school children. Even under liberal federal notice pleading, Appellees are entitled to notice in the Complaint of the actual facts upon which the individual Appellants base their standing to sue. Lemon's resort to the extreme prayer for relief by cutting off educational aid which will benefit many innocent nonpublic school children, can hardly help his child. His action seems more punitive than remedial. Lemon may not complain of "possibilities" and future threats. See *e.g., United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). As the Supreme Court very recently observed:

> "A proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues', (citing *United Public Workers* v. *Mitchell* at 90)." *Flast* v. *Cohen, supra,* at 100.

From all of the foregoing, it is clear that the lower court was correct in its unanimous holding that no individual Appellant has standing to sue under the Equal Protection Clause.

CONCLUSION

It Is Respectfully Submitted That This Court Should Affirm the Judgment Below.

Dated August 10, 1970

Respectfully submitted,

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SUPPLEMENT

SUPPLEMENT

SUPPLEMENT A

Impact of Nonpublic Schools Upon Education in the Nation

PART 1

Message From The President of the United States on Education Reform to the Congress of the United States March 3, 1970*

* * *

(*f*) *Non-Public Schools.*—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand non-public elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

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* 91st Congress, 2d Session, House of Representatives, Document No. 91-267.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities.

There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools.

The specific problem of parochial schools is to be a particular assignment of the Commission.

In its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that non-public schools in America are closing at the rate of one a day.

* * * (p. 9)

Part 2

Pennsylvania's Nonpublic Schools—Financial Impact, Public Contribution

(This study was prepared by the Pennsylvania Catholic Conference, 212 State Street, Harrisburg, Pennsylvania and issued June, 1967.)

Financial Significance of Nonpublic Education In Pennsylvania

To meet the commitment to give all children in this State a sound education, Pennsylvanians are presently spending $1,546,000,000 on elementary and secondary education. According to the Pennsylvania Department of Public Instruction:

- $561 million of this sum is contributed annually by the Commonwealth.

- $635 million is contributed by taxpayers at the local school district level.
- $350 million represents the value of the contribution of those who send their children to nonpublic elementary and secondary schools.

Analysis of these figures brings out certain additional facts:

- $350 million represents 23 percent of the total cost of elementary and secondary education in the Commonwealth.
- $350 million is more than half (62%) of the contribution made by the Commonwealth.
- $350 million is more than half (55%) of the contribution made by the local school districts.

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$350 million is a sum of critical magnitude in the public economy of our local communities and our State. Here is what this sum means in terms of actual expenditures of the Commonwealth of Pennsylvania for 1966-67:

- $350 million would have paid the budgeted cost of operation of 29 of the 33 departments, offices, boards and commissions of the State government;
- OR the combined budgeted cost of:
  Department of Commerce ($41 million)
  Department of Health ($43 million)
  Department of Community Affairs ($11 million)
  Department of Justice ($21 million)
  Department of Labor and Industry ($73 million)
  Department of Agriculture ($5 million)
  Department of Forests and Waters ($16 million)
  Pennsylvania State Police ($4 million)
  Department of State ($14 million)
  Treasury Department ($21 million)

Department of Revenue ($13 million)
Department of Property and Supplies ($54 million)
Department of Mines ($5 million)
Legislature ($9 million)
Judiciary ($8 million)
Public Utility Commission ($3 million)
Department of Military Affairs ($5 million)
Insurance Department ($2 million)

- OR just about the entire budget of the Department of Public Welfare ($356 million);

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These facts are recited in order to emphasize the size and financial significance of the savings effected to the public by virtue of the existence of Pennsylvania's nonpublic schools. The consequences to the public economy by disappearance of this savings, or any substantial fraction thereof, would be most serious.

Local Tax Impact of Nonpublic School Cutbacks

Each public school district determines its own "per pupil cost"—that is, the amount which it feels it is able to afford for the education of children attending its schools. Thus per pupil cost will be found to vary from school district to school district. For example, in Abington School District the per pupil cost is $665; in Greater Latrobe it is $718; in Philadelphia it is $559; in Mount Lebanon, $626; in Westmont Hilltop, $676.

The cost is covered in part by the local school district and in part through reimbursement by the State. The percentage of reimbursement paid by the State to each school district (ranging from 10% to 86%, but presently limited by a ceiling of $400 per pupil) is worked out according to a statutory formula based chiefly on the value of real estate in the particular school district. . . . Under the formula nonpublic school pupils are not counted.

It is not difficult to see from the foregoing that the tax burden resulting from a shift of the nonpublic school population into the public schools of Pennsylvania would be unmanageable in many public school districts. The following table indicates the possible impact of this burden:

School District	Present Budget	Add'l Tax Burden*
Philadelphia	$190,356,179	$85,568,000
Erie City	13,897,410	5,351,164
Abington	10,987,648	3,737,040
Reading	9,251,672	3,060,514
Scranton	10,090,255	3,882,520
• • •		
St. Marys Area	2,201,440	1,259,382
Hanover Area	1,417,398	1,179,468
Olyphant	306,847	536,038
Altoona Area	9,349,832	3,035,565
Penn Cambria	1,647,059	952,740
• • •		
Greater Latrobe	3,618,083	1,421,640
• • •		
Pittsburgh	49,613,950	22,313,000
Mount Lebanon	6,213,637	1,400,938
Homestead-Munhall Area	1,441,617	914,733
Pottsville Area	1,614,679	684,981
Governor Mifflin	2,839,825	451,250
Wilkes-Barre	4,396,259	2,056,250
• • •		
Chester	9,000,000	2,081,784
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* Obtained by multiplying district's per pupil cost by the number of nonpublic school pupils resident in that district.

The difficulties would be particularly acute in major urban areas since the large nonpublic school populations located there would, when added to public school population, further dilute the valuation base upon which State

reimbursement is determined. Thus, for these areas the percentage of reimbursement would be more. Accordingly, both local tax money and required State funds would have to be substantially increased.

State Tax Impact of Nonpublic School Cutbacks

Substantial cutbacks in nonpublic school enrollments would increase not only local tax burdens. They would also add materially to overall State tax burdens. Limited to the area of education, the total State reimbursement would have to be increased in direct proportion to the influx into the public schools of nonpublic school children. The annual operating cost alone to the Commonwealth of an added public school population of the 600,000 pupils now in nonpublic schools would be in excess of $200 million on the basis of the present reimbursement formula.

Another Cost—Capital Expenditures

To speak of annual per pupil cost is not telling the whole financial story. Those who support nonpublic schools have invested vast sums in capital expenditures and until recent years, when the financial pinch has become more acute, have carried an annual multi-million dollar program to renovate or replace outdated facilities and to add new facilities. It is difficult to put a price tag on these facilities, but some idea of their value is given when their replacement cost is considered.

Current estimates indicate that it is possible to build a school for something between $1,800 and $2,000 per student. To this, of course, would have to be added approximately ten to fifteen percent for equipment, furnishings and other related costs. Let it be assumed that the cost of providing for each additional child would be in the neighborhood of $2,000. If the public schools of the Commonwealth were to take on the 600,000 plus students now attending nonpublic schools, the additional cost—in terms of capital ex-

penditure alone—would run in the neighborhood of $1.2 billion. Philadelphia, for example, would be confronted with a building program in the neighborhood of $313 million, while Pittsburgh would be confronted with a $75.5 million undertaking. Again, any substantial fraction of such added costs would prove financially intolerable.

In many urban areas land shortages are severe. Buildings or building sites for new public schools would have to be obtained chiefly through the acquisition of properties which are presently tax-producing. Thus, while, on the one hand, added costs of new construction would have to be assumed, real estate tax revenues would be decreased.

A Cost Not Measurable in Money: Administrative Dislocation

One of the heaviest costs which would result from the sizable transfers of nonpublic school populations would be administrative disorder, the long-term ill effects of which would be visited upon public school administrators, teachers, parents and, most of all, the children. . . .

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Phase Out—Phase In

Rather blithe reference is sometimes made to what is called a "phasing out" of nonpublic education, the assumption being that the very large and remarkably successful nonpublic school systems to which millions of citizens are deeply attached could be dismantled and their pupil population eased into our public schools. Two highly pragmatic difficulties reveal the total impracticality of the theoretical "phase-out": (1) a clearly predictable lack of public school capacity for a "phase-in"; (2) the impossibility of effecting any such movement on a programed basis. A majority of public school boards and administrators today are intensely preoccupied with the question of how they will contrive, in the next few years, simply to meet the

demands to be made upon the public schools on account of normal expectable growth, even without allowance for the manifold improvements being urged upon them by concerned citizens everywhere. . . . It is clear that if this crisis exists, speculation about "phasing-in" substantially new populations from the nonpublic schools is dangerously fanciful. In this connection, it must be pointed out that it is in precisely those areas of Pennsylvania (e.g., Philadelphia and Pittsburgh) where the crisis of the public schools is most acute, that the nonpublic school populations are largest.

The "phasing-out" of the nonpublic schools, if it is to come, would of necessity be dictated not by plan but by the geographically varying intensities of economic pressure, the personal decisions of parents in response to that pressure and the necessarily unprogramed closings of individual nonpublic schools when the long sustained effort to keep them would have collapsed.

The Financial Crisis Facing All Education In Pennsylvania

The Single Source of Educational Funds: the Taxpayer

. . . Faced with new tax burdens, some appear to find comfort in the fact that the State picks up a percentage of such burdens, while the local school districts pay only the balance.

This distinction unfortunately conveys the notion that there are, in fact, two different sources of taxation: one on which the State draws, and one which the local community has available. No such distinction is justified. The cold fact is that only one ultimate source of tax income exists: the individual taxpayer. Both the local and the State governments ultimately depend on this single source. The citizen pays for the cost of education.

Rising Costs for Government, for Living, for Education

Since 1950 the cost of operating state governments has increased about 300%. There is no indication that this trend will be reversed. To the contrary, there is every indication that it will become accentuated in the future. This, however, will be in the face of the fact that traditional sources of tax revenue are rapidly reaching their maximum possible yield, while new sources of tax revenue are more and more difficult to find. . . . State governments are in, or are approaching, financial crisis, and, as the present discussions in our General Assembly all too painfully reveal, Pennsylvania is no exception.

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. . . At the turn of the century the average per pupil cost was approximately $30. Today a number of systems are investing more than $800 per child.

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Rising Costs: Nonpublic Schools in Crisis

Rising cost, however, is not a phenomenon limited to the public schools. . . .

Nonpublic schools are confronted with the same difficulty. Construction and instructional costs have hit hard, and nonpublic school budgets are soaring to all-time records. The search for funds is just as much a preoccupation for the nonpublic school administrator as it is for his public school counterpart. And he agrees with the public school administrator, that simply meeting current needs is not enough, if excellence in education is to be achieved.

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Those who support nonpublic schools are finding it more and more difficult to provide the money even though they are willing to give it. *The demands made on them by an inflated economy and rising taxation for public schools are exhausting their ability to continue the job even though these demands have not exhausted their desire to do so.*

It is the exceptional family that does not live on a budget, and the average family can afford only so much for education. *As a greater share of that money for education is drained off by taxes for public education, little is left to invest in that educational program which does not share in tax funds.*

Ultimately, government at every level reaches into the same pocketbook to meet its needs, and that is the pocketbook of the individual taxpayer. That same pocketbook is the only source of funds available for the support of the nonpublic school.

We are obliged to point out to all of the public:

The curtailment or drastic reduction of the systems of nonpublic schools now serving almost a fourth of the elementary and secondary school children in the Commonwealth is now a distinct possibility.

At the same time all must recognize that such an occurrence would not be isolated in its effects to nonpublic schools alone. On the contrary, *the enforced termination of any substantial portion of nonpublic education in Pennsylvania would have extremely adverse effects upon public education in this State; on a large scale, the effects would be disastrous.*

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The Civil Contribution of Nonpublic Schools

Putting aside for a moment the serious fiscal consequences which the disappearance of nonpublic schools would have on public education, are there any other reasons which might impel us to conclude that they should continue in service?

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One obvious question is whether Pennsylvania's nonpublic schools are doing a good educational job.

The recent study on the merits of Catholic education financed by the Carnegie Foundation, as well as the Gree-

ley-Rossi report prepared at the University of Chicago, reveals the countless problems faced by the majority of nonpublic schools throughout the nation. At the same time, both studies authoritatively confirm what many previous surveys had indicated: *the children attending nonpublic schools are achieving, in the required and usual subjects, at a level beyond that expected of all children by experts in the field of education.*

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The United States Chamber of Commerce Task Force Report on American Education, issued this year, underscores this conclusion. The Report states:

> "We recommend that the government consider continuing to finance education for all children—but that it offer them, as an alternative to public education, financial support for private education up to the amount of the average expenditure per pupil in local public schools. We are led to this somewhat unusual conclusion by our belief in the importance of sound education and our concern that the present institutional structure in education may not be the best way to organize it."

The Report backed the concept of diversity in schools:

> "We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial marketplace. Why settle for the single choice in education? . . . We think it desirable that parents have a choice of schools for their children. . . . Different schools, none of them perfect, will have different combinations of strengths and weaknesses. Parents . . . should be able to choose to find the combination that best satisfies them and their children."

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Part 3

Geographical Data on Nonpublic Schools in the United States

Source: Professor Robert J. Havighurst (Professor of Education, University of Chicago), Symposium Paper, "Social Function of Catholic Education", published in "Catholic Education Today and Tomorrow" (National Catholic Educational Association, 1968), pp. 9-11.

Catholics had always been predominantly urban, and they now became metropolitan. Table 2 shows the percentages of all elementary school pupils who were enrolled in nonpublic schools in the 30 largest metropolitan areas in 1960. Whereas 15 per cent of all elementary school pupils in the U.S.A. were enrolled in nonpublic schools, 25 per cent of pupils in the 10 largest SMSAs were in nonpublic schools, and 19 per cent were so enrolled in the next 20 SMSAs. Only two of the top 10 areas, Los Angeles and San Francisco, had less than 15 per cent in nonpublic schools. The Table shows that the largest proportion of nonpublic school pupils are in the Northeast and the North Central states, with the smallest proportions in the South and on the West Coast. At least 75 per cent of nonpublic schools and 90 per cent of nonpublic school enrollment are Catholic.

TABLE 2

PERCENTAGES OF ELEMENTARY SCHOOL PUPILS ENROLLED IN NONPUBLIC SCHOOLS IN 30 PRINCIPAL SMSAs IN 1960

SMSA	Percent	Population (000)
New York-Newark-Jersey City	28	14,759
Chicago-Gary	32	6,794
Los Angeles-Long Beach	13	6,039
Philadelphia	34	4,343
Detroit	21	3,762
San Francisco-Oakland	13	2,649
Boston	23	2,595
Pittsburgh	29	2,405
St. Louis	29	2,105
Washington	18	2,002
Top Ten	25	47,400

SMSA	Percent	Population
Cleveland	29	1,904
Baltimore	20	1,727
Minneapolis-St. Paul	27	1,482
Buffalo	30	1,307
Cincinnati	33	1,268
Houston	9	1,203
Milwaukee	37	1,233
Kansas City	16	1,093
Dallas	7	1,083
San Diego	9	1,033
Seattle	11	1,017
Atlanta	5	1,017
Miami	11	935
Denver	13	929
Indianapolis	16	917
New Orleans	33	907
Portland, Ore.	12	822
Providence	30	821
San Bernardino, California	9	810
Tampa-St. Petersburg	7	772
Next Twenty	*19*	*22,300*
Total, USA	*15*	*180,000*

Table 3 is taken from an article by Erickson and Greeley, and shows the metropolitan areas with more than 30 per cent of elementary school pupils enrolled in nonpublic schools. Four of the first 15 are in the state of Wisconsin, where parochial schools have been especially strong, due

partly to the German influence. Of the first 20 SMSAs, six are in New England, and all the rest are in the Northeast and Middle West except for New Orleans.

TABLE 3

PERCENTAGES OF ELEMENTARY SCHOOL PUPILS ENROLLED IN NONPUBLIC SCHOOLS IN STANDARD METROPOLITAN STATISTICAL AREAS, 1960
(Higest 20 SMSAs)

SMSA	Percent	SMSA	Percent
Dubuque, Iowa	69	New Orleans	33
Green Bay, Wisconsin	55	Chicago-Gary	32
Lewiston, Maine	51	Rochester, New York	32
Manchester, N.H.	49	Kenosha, Wisconsin	31
Fitchburg, Massachusetts	41	Racine, Wisconsin	31
Bay City, Michigan	40	Ft. Wayne, Indiana	31
Jersey City, New Jersey	39	Fall River, Massachusetts	31
Milwaukee, Wisconsin	37	Lawrence, Massachusetts	30
Philadelphia	34	Buffalo, New York	30
Cincinnati	33	Providence, Rhode Island	30

Source: U.S. Bureau of the Census, 1960 Vol 1. U.S. Summary, Part 1.

Thus the developments in Catholic school systems which produce their particular contemporary quantitative characteristics are best seen in the large metropolitan areas of the Northeast and the Middle West. These developments have been studied for the Chicago Archdiocese (Cook and Lake Counties) by James Sanders, who has provided the first systematic data concerning the growth, distribution, and movement of Catholic schools in a large metropolitan area.

SUPPLEMENT B

Laws and Programs Involving Administrative Relationships Between Government and Denominational Educational Institutions

PART 1

FEDERAL LAWS AND PROGRAMS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Adult Basic Education. (P.L. 89-253; 78 Stat. 520; 42 U.S.C. 2801-2822). Authorizes O.E.O. to contract with or make grants to private colleges for training of teachers of illiterates.

Advanced Training of Nursing Teachers and Supervisors. (Public Health Service Act. Sec. 307; P.L. 86-105;73 Stat. 239; 42 U.S.C. 242(E)). Provides for the award of traineeships by grants to educational institutions for the training of nurses for supervisory or teaching positions.

Cancer and Chronic Disease Control Grants. (P.L. 88-136; 62 Stat. 469; 42 U.S.C. 282, 283). Provides grants to institutions of higher education for training programs in cancer control, prevention, and eradication.

Child Welfare Research, Training and Demonstration Projects. (Social Security Amendments of 1960; P.L. 86-778; 74 Stat. 997; 42 U.S.C. 726 (1964) as amended). Provides grants to nonprofit institutions of higher learning for special projects in the field of child welfare.

Chronic Diseases and Health Problems of the Aged. (Public Health Service Act, Sec. 301; P.L. 78-410; 58 Stat. 691; 42 U.S.C. 241 (1964), as amended). Grants to nonprofit health agencies and universities for research in the field of health problems of the aged are authorized.

Clean Air Control. (P.L. 88-206; 77 Stat. 392; 42 U.S.C. 1857). Authorizes grants to private educational institutions for research and surveys in air pollution.

College Library Resources. (Part A, Title II, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1224; 20 U.S.C. 1021-1028). Provides grants for acquisition of library resources to any accredited institution of higher education.

Cooperative Research Program. (Elementary and Secondary Education Act of 1965, Title IV; P.L. 89-10; 79 Stat. 44; 20 U.S.C. 331-332B (1965)). Authorizes grants and contracts to public and private universities and colleges for research, surveys and demonstrations in the field of education.

Crippled Children's Services. (Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Secs. 3 and 4; P.L. 88-156; 77 Stat. 273; 42 U.S.C. 711-715 (Supp. V)). Provides for special grants to public and private institutions of higher learning for projects that contribute to the advancement of services for crippled children.

Education Advisory Services and Data. (Enabling Law of the Office of Education, 1867; U.S.C., Title 20–Education). Provides advisory services and publications to any school, college or university to aid in improving educational practices, methods of financing, construction of facilities, etc.

Education of Children of Low Income Families. (Elementary and Secondary Act of 1965; P.L. 89-10; as amended by P.L. 89-313). Provides grants to States for distribution to local agencies for expanding and improving educational programs for public and non-public school children.

Educational Opportunity Grants. (Part B, Title IV, Higher Education Act of 1965; P.L. 89-329; 79 Stat.

1232; 20 U.S.C. 1061-1069). Grants to deserving students to attend the institution of higher education of his choice are authorized.

Environmental Engineering and Food Protection. (Public Health Service Act, Sec. 301, as amended; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241 (1964), as amended). Provides grants to colleges and universities for support of specified research projects.

Equal Education Opportunities Programs. (P.L. 88-352; 78 Stat. 246). Federal grants may be made to private institutions of higher education to operate programs dealing with desegregation in education.

Equipment to Improve Undergraduate Instruction. (Part A, Title VI, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1261; 20 U.S.C. 1121). Authorizes grants to pay part of the cost of laboratory, classroom or library equipment for the teaching of secular subjects to all institutions of higher education.

Faculty Development Programs. (Part B, Title VI, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1266; 20 U.S.C. 1131). Provides grants or contracts to all institutions of higher education for the operation of workshops, institutes, and programs for teachers in higher education.

Fellowships for Teachers. (Part C, Title V, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1258; 20 U.S.C. 1111). Provides for fellowships for graduate study leading to a masters degree to teachers or recent graduates wishing to enter the profession.

Grants for College Work—Study Program. (Economic Opportunity Act of 1964, Title I; P.L. 88-452, 78 Stat. 513; 42 U.S.C. 2751-2756 (1964). Part C, Title IV, Higher Education Act of 1965). Provides grants to public or private nonprofit institutions of higher edu-

cation to help them to assist students stay in school by providing part-time employment.

Guidance, Counseling, and Testing. (National Defense Education Act, Title II A and B; P.L. 88-210; P.L. 88-665; 72 Stat. 1592; 20 U.S.C. 481-484). Grants may be provided to the States or directly to private schools for the guidance, counseling and testing of elementary and secondary school children.

Health Professions Educational Assistance. (Title VII, Public Health Service Act, as amended; P.L. 89-290; 79 Stat. 1056-1058; 42 U.S.C. 292-295(e)). Provides funds for the construction or renovation of medical teaching facilities as well as student loans and scholarships for students of health professions.

Health Research Facilities. (Public Health Service Act; P.L. 89-115; 79 Stat. 448; 42 U.S.C. 292). Authorizes grants to institutions of higher education for construction of medical research facilities.

Health Research Project Grants. (Public Health Service Act; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241D). Provides grants to defray costs of research in physical and mental illness and in water and air pollution to institutions of higher education.

Higher Education Facilities Construction Grants. (Title VII, Sec. 701A, Higher Education Act of 1965, amending Sec. 106 Higher Education Facilities Act of 1963; P.L. 89-329; 79 Stat. 1267; 20 U.S.C. 701-733). Provides grants to institutions of higher education for construction of graduate and undergraduate academic facilities for research and instruction in the sciences, languages, and for libraries.

Higher Education Facilities Construction Loans. (Title III, Higher Education Facilities Act of 1963; P.L. 88-204, 77 Stat. 372; 20 U.S.C. 741). Provides loans for

up to 75 percent of the cost of construction of academic facilities in institutions of higher education.

Hospital Construction and Renovation. (Public Health Service Act; P.L. 88-581; 78 Stat. 919; 42 U.S.C. 291). Provides grants to colleges or universities for construction or renovation of hospital facilities.

Institutes for Teachers of Disadvantaged Youth. (National Defense Education Act, as amended; P.L. 88-665. Title IX; P.L. 85-864; 78 Stat. 1107; 20 U.S.C. 15AAA-15GGG). Provides funds to institutions of higher education to operate institutes of advanced study for teachers of disadvantaged youth.

Juvenile Delinquency and Youth Development. (P.L. 88-368; 78 Stat. 309; 42 U.S.C. 2542-2544). Authorizes grants to institutions for projects, training and research in the prevention and control of juvenile delinquency.

Language and Area Centers. (National Defense Education Act; P.L. 88-665; 78 Stat. 1106; 20 U.S.C. 511a). Authorizes contracts with institutions of higher education to establish foreign language teaching centers.

Language Fellowships. (National Defense Education Act; P.L. 88-665; 78 Stat. 1106; 20 U.S.C. 511B). Provides payments to students to meet costs of training in selected modern foreign languages.

Language Research. (National Defense Education Act; P.L. 85-864; 72 Stat. 1594; 20 U.S.C. 512). Authorizes contracts with institutions of higher education for studies and surveys in instruction in foreign languages.

Language Institute Programs. (National Defense Education Act; P.L. 87-344; 75 Stat. 760; 20 U.S.C. 491, 521). Authorizes contracting with institutions of higher education for programs to improve qualifications of foreign language teachers. A similar provi-

sion covers institutions for academic counselors in elementary and secondary schools.

Library Training and Research. (Part B, Title II, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1227, 1228; 20 U.S.C. 1031-1034). Provides grants to institutes of higher education for the teaching of library science.

Loans to Nonprofit Private Schools. (National Defense Education Act; P.L. 85-864; 78 Stat. 1104; 20 U.S.C. 445). Provides for grants to State educational supervisory services for the acquisition of science, mathematics and foreign language equipment. A percentage of these funds must be alloted for loans to private, nonprofit elementary and secondary schools for the acquisition of such equipment.

Loans to Students in Institutions of Higher Education. (National Defense Student Loan Program). (National Defense Education Act, Title II, amendments 1964: P.L. 88-665; 78 Stat. 1100-1102; 20 U.S.C. 421-429 (1964)). Provides loan funds to eligible college or university to make low interest loans to needy students.

Low Interest Loans to Students in Institutions of Higher Education. (Part B, Title IV, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1236; 20 U.S.C. 1071). Provides loan insurance to students enrolled in a public or non-profit private institution of higher education on a half-time or full-time schedule.

Maternal and Child Health Services. (Maternal and Child Health and Mental Retardation Amendments of 1963: P.L. 88-156; 77 Stat. 273; 42 U.S.C. 701). Authorizes special project grants to extend and improve maternal and child health services to nonprofit institutions of higher education.

Medical Library Assistance. (Title III, Public Health Service Act, as amended; P.L. 89-291; 79 Stat. 1067; 42 U.S.C. 280A-280B). Provides grants for the construction, expansion or renovation of medical library facilities to public and private institutions of higher education.

Medical Research Grants. (Public Health Service Act; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241). Authorizes research grants to public and private institutions of higher education.

Mental Health-Research and Training. (Public Health Service Act; 70 Stat. 929, 930; 42 U.S.C. 242(A)(B)). Colleges and universities are eligible for grants for research and training in the field of mental health.

Mental Retardation—University Affiliated Clinical Facilities. (Mental Retardation Facilities Construction Act of 1963; P.L. 88-164; Titles I, IV; 77 Stat. 282; 42 U.S.C. 291K). Provides project grants to college and university hospitals for the construction of mental health clinical facilities.

National Defense Fellowships. (National Defense Education Act; P.L. 88-665; 78 Stat. 1105; 20 U.S.C. 464). Provides funds to institutions of higher education for the award of graduate fellowships.

Nursing School Construction. (Nurse Training Act of 1964; P.L. 88-581; 78 Stat. 908; 42 U.S.C. 296). Construction grants for nursing school facilities are authorized.

Nurse Training. (Title VIII, Public Health Service Act as amended; P.L. 88-581; 78 Stat. 908-918; 42 U.S.C. 296, 297). Provides grants to public and private nonprofit schools of nursing for student loans, nursing training programs, and construction of training facilities.

Preparation of Professional Personnel for the Education of Handicapped Children. (Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963; P.L. 88-164; 77 Stat. 294; 20 U.S.C. 611-618 (Supp. V) 1963). Provides grants to public and nonprofit colleges and universities for expansion in the education of handicapped children.

Preschool and School Child Health. (1965 Amendments to Social Security Act; P.L. 89-97; 79 Stat. 286; 42 U.S.C. 729). Authorizes grants to private schools of medicine and teaching for health care and services to children.

Public Health Training—Traineeships. (Graduate Public Health Training Amendments of 1964; P.L. 88-497; 78 Stat. 613; 43 U.S.C. 242D (1964)). Provides grants to be used as tuition, fees, and allowances by students and institutions for public health training.

Project Grants for Graduate Training in Public Health. (Public Health Service Act, Sec. 309; P.L. 88-497; 78 Stat. 613; 42 U.S.C. 242(g)). Provides project grants for graduate training in public health to educational institutions.

Regional Medical Programs. (Heart Disease, Cancer, and Stroke Amendments of 1965; P.L. 89-239; 79 Stat. 926; 42 U.S.C. 299). Grants are available to nonprofit colleges and universities for the operation of regional medical programs of research and training.

Research in Maternal, Crippled Children and Child Health Services. (Maternal and Child Health and Mental Retardation Planning Amendments of 1963; P.L. 88-156; 77 Stat. 274; 42 U.S.C. 729 (1964)). Provides grants to public and nonprofit institutions of higher learning for the improvement of services in the field of maternal and child health services.

Research and Experimentation in Mass Medias. (National Defense Education Act; P.L. 85-864; 72 Stat. 1595; 20

U.S.C. 542). Provides for grants or contracts for research, experimentation, and dissemination of information by institutions of higher education in the field of communications media for educational purposes.

Research Fellowship Grants and Awards. (Public Health Service Act, Secs. 301(G), 433(A); P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241(c), 289(c)). Provides funds for the award of fellowships in health research or training either to the individual or directly to the educational institution.

School Library Resources, Textbooks, and Other Instructional Materials. (Elementary and Secondary Education Act of 1965; P.L. 89-10; 79 Stat. 36; 20 U.S.C. 821-827). Provides grants to States for acquisition of library and instructional materials which shall be made available to public and private elementary and secondary schools for the teaching of secular subjects.

Strengthening Developing Institutions. (Title III, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1229-1230; 20 U.S.C. 1051-1055). A program to assist accredited small colleges and universities in raising their academic qualities.

Student Assistance for College Work-Study Program. (Economic Opportunity Act of 1964; P.L. 88-452; 78 Stat. 513; 42 U.S.C. 2751-2756 (1964)). Provides part-time employment to students in institutions of higher learning who need employment to pursue courses of study.

Vocational Education Research Grants. (Vocational Education Act of 1963; P.L. 88-210; 77 Stat. 403; 20 U.S.C. 15AA, 15BB, 15AAA, 35-35N (Supp. V)). Provides grants to colleges, universities or other public or nonprofit institutions for research and training in vocational education.

Vocational Rehabilitation—Research, Training, and Demonstration. (Vocational Rehabilitation Act of 1920; P.L. 66-236; 41 Stat. 735; 29 U.S.C. 31-41 (1964), as amended). Provides grants to public and nonprofit private educational institutions in support of research and training projects, facilities, and centers in the field of rehabilitative medicine.

Vocational Rehabilitation Fellowships. (Vocational Rehabilitation Act; P.L. 89-333 Sec. 4A; 79 Stat. 1289; 29 U.S.C. 34(A)). Authorizes research fellowships for study and research at public and private institutions of higher education.

GENERAL SERVICES ADMINISTRATION

Disposal of Federal Surplus Real Property. (Federal Property and Administrative Services Act of 1949; P.L. 81-152; 63 Stat. 377; 50 U.S.C. 1622-1641). Provides price preference for nonprofit hospital and educational institutions for purchase of property to be used for health or educational services.

Donation of Federal Surplus Personal Property. (Federal Property and Administrative Services Act of 1949; P.L. 81-152; 63 Stat. 377; 50 U.S.C. 1622, 1641). Provides for donation of federal personal property to tax exempt universities, colleges or schools.

DEPARTMENT OF INTERIOR

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Research and Development Programs. (P.L. 87-295; 75 Stat. 628; 42 U.S.C. 1953). Grants and contracts are made with institutions of higher education, both public and private, for research and construction of research facilities.

STATE DEPARTMENT

The State Department supports educational activities to a considerable extent by a variety of programs for international exchange, improvement of cultural relationships and rendering of technical assistance to foreign countries. Basically, under the programs, students from this country are permitted to attend educational institutions abroad and students from foreign countries are permitted to attend educational institutions in this country. In either case payments are made to cover the cost of instruction and subsistence. For the education of foreign students in this country, the State Department makes contractual arrangements with the Institute of International Education, a private nonprofit organization in New York City, which in turn sponsors and makes specific arrangements for educating the foreign students. Training for a profession in religion is not financed but schools with religious affiliation are used. In performing this Service IEE gives financial aid to the students to cover tuition and other related student costs.

The State Department has also made direct financial arrangements with universities and charitable organizations in this country to provide student leader seminars, high school training for teenagers, and English language classes for foreign students. In addition, the State Department has a variety of exchange and other educational programs by which foreign individuals are able to study in this country with the assistance of other Government agencies and private educational organizations. Examples of programs are:

1. U. S. information and educational exchange programs (22 U.S.C. 1991, et seq)
2. Technical cooperation with foreign countries (22 U.S.C. 1891, et seq.).

DEPARTMENT OF AGRICULTURE

Commodity Distribution Program . (Agricultural Adjustment Act of 1949; 63 Stat. 670; 7 U.S.C. 1301). Any public or nonprofit private school or charitable institution serving needy persons is eligible for food commodities.

Cooperative Agricultural and Forestry Research Program. (76 Stat. 806; 16 U.S.C. 582a-582a-7). Makes research funds available to designated research institutions.

Forestry Research. (Forest Products Act; P.L. 85-934; 72 Stat. 1793; 16 U.S.C. 581). Provides grants for forestry research to universities and private research institutions.

National School Lunch Program. (National School Lunch Act; P.L. 87-823; 79 Stat. 944; 42 U.S.C. 1751 et seq.). Secretary of Agriculture makes funds available to States for distribution to public or private schools.

Special Milk Program for Children. (National School Lunch Act; P.L. 87-823; 79 Stat. 944; 42 U.S.C. 1751 et seq.). Funds of Commodity Credit Corp. are used to provide milk to private elementary and secondary schools.

Use of National Forests. (30 Stat. 36; 16 U.S.C. 479). Authorizes occupancy of 2 acres of national forest land for the erection of a school.

DEPARTMENT OF COMMERCE

Research and Development Programs. Grants and contracts for research and development, together with research facilities, are made with educational institutions both public and private.

ATOMIC ENERGY COMMISSION

(Atomic Energy Act of 1946; (P.L. 585) as amended, Secs. 3(A), 5(c)(2); 70 Stat. 1069; 42 U.S.C. 2051, 2111). Commission operates a variety of programs under which support is given for activities in institutions of higher education. These programs are grouped as follows:

Equipment, materials and services

Grants and loans of laboratory equipment, research reactors, and teaching aids are made to institutions.

Research and development programs

Grants or contracts are made with institutions of higher education for research and construction of research facilities in fields involving atomic energy.

Student fellowships

Payments are made to individuals to cover tuition and subsistence for study in nuclear science and engineering and for graduate work in the atomic energy aspects of the life sciences.

Training programs

Summer institutes for teachers and other training programs are offered in various fields relating to atomic energy.

HOUSING AND HOME FINANCE AGENCY

College Housing Program. (Housing Act of 1950; P.L. 81-475; 64 Stat. 77; 12 U.S.C. 1749). Provides long-term loans for construction of housing and other service facilities for students and faculty to institutions of higher education.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

University Research Program. (National Aeronautics and Space Act of 1958; P.L. 85-568, sec. 203(b)(5); 72 Stat. 429; 42 U.S.C. 2473(b)(5)). Research is conducted through contract with institutions of higher education in matters within the scope of interest of the National Aeronautics and Space Administration.

NATIONAL SCIENCE FOUNDATION

(National Science Foundation Act of 1950 (P.L. 507, 81st Cong.), secs. 3(a)(2), (3), (4) and (b), 11(c) and 14, as amended by P.L. 85-510, sec. 2, and P.L. 86-232, sec. 1; 42 U.S.C. 1862 (a), (2), (3), (4), and (b), 1870(c) and 1872a(b)). Pursuant to broad statutory authorizations to foster research and education in scientific fields, the National Science Foundation provides the following support for activities in institutions of higher education:

1. Fellowships for various types of graduate studies include allowance for tuition and subsistence and permit study at any accredited nonprofit institution of higher education in the United States or abroad.

2. Summer, academic year and inservice institutes are financed at institutions of higher education through stipened and tuition payments to improve the qualifications of high school and college teachers in science and mathematics. Stipends are paid without regard to the fact that the teacher is from a private school.

3. Special projects in science education are financed to provide the experimental testing and development of promising new ideas for the improvement of science instruction.

4. Programs are financed to improve course content and supplementary teaching aids in science.

5. Grants are made for basic research in the sciences, including funds for the use of graduate students as research assistants.

DEPARTMENT OF DEFENSE

Reserve Officer Training Programs. (39 Stat. 191; 10 U.S.C. 4382 (1916)). Authorizes the President to establish and maintain in civil educational institutions a training program leading to a commission in the armed forces. Payments are made to the institution in support and maintenance of such programs.

Training and Research Programs. (72 Stat. 1793; 42 U.S.C. 1891-1893 (1958)). Provides for research and training contracts *or* grants to be made with nonprofit institutions of higher learning both public and private. The Department of Defense has a number of training and research programs which finance activities at institutions of higher education. Research contracts fall under the procurement authority of each of the three branches of the Armed Forces. Thus, research is supported because of benefits to be received by the Defense Department and training is paid for because it improves the qualifications of mliitary and civilian personnel. Such arrangements have also been made on a grant basis to institutions pursuant to 42 U.S.C. 1891-1893, which specifies that the authority to contract for certain scientific research at nonprofit institutions of higher education shall be deemed to be authority to make grants.

VETERANS' ADMINISTRATION

Vocational Rehabilitation. (Veterans' benefits (P.L. 85-857), ch. 31, secs. 1503, 1504; 72 Stat. 1171; 38 U.S.C. 1503, 1504). Training is purchased from educational institutions of all types for the rehabilitation of war veterans with service connected disabilities. In addition, a subsistence allowance is paid the veteran.

Educational Benefits for World War II and Gorean Veterans. (Veterans' benefits (P.L. 85-857), ch. 33, sec. 1601 et seq.; 72 Stat. 1174; 38 U.S.C. 1601 et seq.). Educational benefits for veterans of World War II were included in P.L. 346, 78th Congress. This legislation has since been extended to provide educational benefits to veterans of subsequent conflicts.

War Orphans, Educational Assistance. (Veterans' benefits (P.L. 85-857), ch. 35, secs. 1701 et seq.; 72 Stat. 1193; 38 U.S.C. 1701 et seq.). This pragarm provides educational opportunities for children of wartime veterans who died from a service-incurred disease or injury. The student must be pursuing an approved program of education in an institution of higher education or in a vocational school below the college level. The Veterans' Administration is required to pay each educational institution $1 per month for each eligible person enrolled to assist in defraying the cost of preparing and submitting reports (38 U.S.C. 1765).

G.I. Bill of 1966. (Veterans Readjustment Benefits Act of 1966; P.L. 89-358; 80 Stat. 12; 38 U.S.C. 1651). Extends the benefits of higher education to eligible veterans through direct payments to the veteran.

SMALL BUSINESS ADMINISTRATION

Business Management Research. (Small Business Investment Act of 1958; P.L. 85-699; 72 Stat. 698; 15 U.S.C. 636(d)). Provides for grants for research and development in the field of business management and finance to colleges and universities.

MISCELLANEOUS PROGRAMS

Educational Costs of Congressional and Supreme Court Pages. (60 Stat. 839; 2 U.S.C. 88(a)(c). Provides for payments to private or parochial schools for the education of pages.

Part 2

Significant Programs of Major Industrial and Other States Aiding Nonpublic Education

New York. *Mandated Services Act* (Chapter 138 of the Laws of 1970) (N.Y. Educ. Law § —). Provides for an annual apportionment of state monies, payable directly to nonpublic schools for expenses of services for examination and inspection in connection with administration, grading, compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. Payment for religious worship or instruction is expressly prohibited by the act.

Textbook Loan Act (N. Y. Educ. Law § 701) provides for free furnishing, to pupils enrolled in nonpublic schools, of secular textbooks designated for use in public schools or approved by public school authorities.

New York also provides student health service programs for nonpublic schools (N. Y. Educ. Law § 912); nonpublic school bus transportation (N. Y. Educ. Law § 3635); and special educational programs for handicapped children (N. Y. Educ. Law § 4407), neglected children (N. Y. Educ. Law § 4401), blind and deaf children (N. Y. Educ. Law § 4204).

Ohio. *Auxiliary Materials and Services Act* (Ohio Rev. Code § 333.06 (H)). Provides services and materials in nonpublic schools for: guidance, testing and counseling programs; programs for deaf, blind, emotionally disturbed, crippled and physically handicapped children. Also provides audio visual aids,

speech and hearing services, remedial reading programs, educational television services, programs for the improvement of the educational and cultural status of disadvantaged pupils.

Vocational Educational Training Program (Ohio Rev. Code § 3319.90). Requires public school districts to establish vocational training programs and to permit nonpublic school pupils to participate in such programs without cost.

State also provides nonpublic school bus transportation (Ohio Rev. Code § 3327.01) and driver education (Ohio Rev. Code § 3301.17) for nonpublic school students.

Pennsylvania. Pennsylvania Nonpublic Elementary and Secondary Education Act (24 Pa. Stat. Ann. § 5602 *et seq.*) provides for the purchase of educational services from nonpublic schools in four secular subjects: Mathematics, Physical Science, Physical Education, and Modern Foreign Languages. Reimbursement is made to the school only after it has rendered the secular educational services. Reimbursement is limited to: teacher salaries, textbooks, and instructional materials. Expressly prohibited in the teaching of subjects for which reimbursement is sought is the inclusion of any subject matter expressing religious teaching, or the morals or form of worship of any sect.

The state also provides nonpublic school bus transportation (Pa. Stat. Ann. Tit. 24 § 13-1361); nonpublic school nurse and dental services (Pa. Stat. Ann. Tit. 24 § 14-1402); and driver education (Pa. Stat. Ann. Tit. 24 § 15-1519.1)

Michigan. Teacher Salary Supplement Act (Mich. Stat. Anno. § 15.1919, *et seq.*). Provides for payment to nonpublic schools of 50 per cent of the salaries of

certified lay teachers who teach secular subjects in nonpublic schools. This percentage rises to 75 per cent after the first year of operation of the Act. Secular subjects are those subjects taught in the public schools and which shall expressly not include any course of instruction in religion or denominational tenets, doctrine or worship or the primary purpose of which is to inculcate such tenets, doctrine or worship. The appropriation for this Act can never exceed 2 per cent of the money appropriated for the public schools.

Auxiliary Services Act (Mich. Stat. Ann. § 15.3622). Provides the following auxiliary services to nonpublic schools: health and nursing services and examinations, street crossing guards, National Defense Education Act testing services, speech correction services, visiting teacher services for deliquent and disturbed children, school diagnostic services for mentally handicapped children, teacher counseling services for physically handicapped children, teacher consultant services for mentally handicapped and emotionally disturbed children, and remedial reading services.

The state also provides nonpublic school bus transportation (Mich. Stat. Ann. § 15.3592)

Connecticut. Nonpublic School Secular Education Act (Conn. Gen. Stat. Tit. —— § ——; Public Act 791, 1969). Provides for the purchase of secular educational services from nonpublic schools. The state reimburses the schools after the services have been rendered for 20 per cent of teachers' salaries and for purchase of textbooks ($10 per elementary student and $15 per secondary student). Reimbursement to a school rises to 50 per cent of a teacher's salary if one third of the students are from low income families and 60 per cent of a teacher's salary

if two thirds of the students are "educationally deprived" as that term is defined by Connecticut law. A "secular subject" is defined as "any course which is presented in the curricula of the public schools of this state". Expressly prohibited is "any instruction in religious or denominational tenets, doctrine or worship".

The state also provides nonpublic school bus transportation (Conn. Gen. Stat. Tit. 10, § 10-281), health services (Conn. Gen. Stat. Tit. 10, § 217(A)) and driver education (Conn. Gen. Stat. Tit. 10, § 10-281).

Rhode Island. Teacher Salary Supplement Act. (R.I. Gen. Laws Ann. § 16-51-3). Pays up to fifteen percent of the salaries of teachers who teach in nonpublic schools. Eligible teachers are those who teach subjects required by law to be taught in the public schools of the state and who receive the minimum salary required by state law for public school teachers.

State Textbook Act. (R.I. Gen. Laws Ann. § 16-23-2). Provides textbooks to nonpublic school children.

* * * *

Many other states provide various forms of aid to church-related education. Among these are textbooks (see Burns Ind. Stat. Ann. § 28-638 (Ch. 411, Acts of 1969); La. Rev. Stat. Ann. § 13:1579; N. M. Stat. Ann. § 77-13-1, *et seq.*; R. I. Gen.; Laws Ann. § 16-23-2) and bus service (see Cal. Educ. Code § 16806; 122 Ill. Ann. Stat. § 29-4); 6 Burns Ind. Stat. Ann. § 28-2805; Laws of Kas. 1947, C. 359, § 6; Ky. Rev. Stat. § 158-115; La. Rev. Stat. Ann. § 72-619; Me. Rev. Stat. Ann. §§ 20-220, 30-35104 (5) (Supp. 1965); Ma. Acts 1937, C. 185, § 146 A; 40 Laws of Mass. Ann. § 4; 71 Laws of Mass. Ann. § 368; 76 Laws of Mass. Ann. § 1; N. H. Rev. Stat. Ann. § 189.0; N. M. Stat. Ann. § 73-7-67; N.J.S.A. (Supp. 1965) § 18:14-10; Or. Rev. Stat. § 338.060, 1939, C. 352 § 1; R.I.G.L. 1938, C. 148 § 31.

SUPPLEMENT C

Public Regulation of Nonpublic Education in Pennsylvania

Nonpublic schools, including those which are religiously affiliated, ve for many years been subject to extensive regulation, both by the mmonwealth of Pennsylvania as well as the federal government.

tatute/Regulation	Description	Manner of Regulation
de*—Title	"An act relating to the public school system, including certain provisions applicable as well to private and parochial schools . . ."	Provides that many of the regulations applicable to public schools apply equaly to nonpublic schools.
	REGULATION AS TO CURRICULUM	
de—§ 1327	Compulsory attendance law.	Requires all children to attend a "day school in which subjects and activities prescribed by the State Council of Education are taught . . ."—gives broad power to State Council of Education to prescribe standards for curriculum in nonpublic schools.
gulations, State Board Education of Pennsylvia, Chapter 7, General rriculum Regulation, rch 14, 1969, § 7—210.	Issued pursuant to Code—§ 1327	Prescribes courses of study to be taught in all public and nonpublic elementary schools—subjects include, *inter alia*, the four subjects compensable under Act 109.
, § 7-232 § 7-233		Prescribes courses of study to be taught in all public and nonpublic secondary schools—and courses of study required for graduation for all secondary students—subjects include, *inter alia*, the four compensable subjects under Act 109.

*Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, Pa. Stat. Ann. 1-101, *et seq.*

Statute/Regulation	Description	Manner of Regulation
Code—§ 1511	Statutory provision prescribing curriculum	Prescribes a list of approximately fifteen subjects taught "[i]n every elementary public and private school . . . "—also gives State Board of Education power to prescribe additional subjects.
Code—§ 1605	Statutory provision prescribing curriculum	Prescribes subject matter be integrated into social studies curriculum—and instruction to have as its purpose the instilling patriotism into children who come "to of our public and parochial schools."
School Administrators' Memorandum 93, Commonwealth of Pennsylvania, Department of Education,* June 13, 1968	Regulations prescribing content of courses of study	Prescribes that in each course of history (United States and Pennsylvania) taught in all public and private elementary schools there shall be taught the contributions made by Negroes and other racial and ethnic groups.
School Administrators' Memorandum 113, Commonwealth of Pennsylvania, Department of Education, August 28, 1968	Implementing regulation	Implements the aforesaid School Administrators' Memorandum 93.
	Regulation as to Approval	
Code—§ 1327	Compulsory attendance law	Gives plenary power to State Board of Education to approve schools.
Regulations, State Board of Education, March 14, 1969, Chapter 7 (supra) § 7-322	Issued pursuant to Code—§ 1327—approval of schools	Prescribes that "[a]ll schools—public, nonpublic, nonprofit and private shall be subject to periodic evaluation by Superintendent

* Prior to July 23, 1969, designated "Department of Public Instruction"

Statute/Regulation	Description	Manner of Regulation
		Education''—all secondary schools must be approved—standards governing approval: (a) those established by the Department of Education; (b) accreditation by the Middle States Association of Colleges and Secondary Schools.
School Administrators' Memorandum 89, Commonwealth of Pennsylvania, Department of Education, June 15, 1968	Advises of the issuance of document entitled ''Minimum Standards for Approval of Secondary School Programs'', Pennsylvania Department of Education, 1968	Prescribes minimium standards or criteria which all schools (public and non-public) must meet for approval—these relate to the following areas: Program of studies; library quality and quantity; certification of professional employees; provision for exceptional children; medical, dental and school nurse service; attendance service; inservice training of professional employees; textbooks; instructional material; audio-visual equipment; guidance service; occupational, vocational, and technical education; administrative or clerical service; pupil—teacher ratio; co-curricular activities; instructional planning of time for professional employees.
Regulation, State Board of Education, March 14, 1969, Chapter 7 (supra) § 7-323	Significance of school approval	Certification that diplomas issued by approved nonpublic schools constitute valid pre-professional credentials.
REGULATION AS TO ATTENDANCE AND LENGTH OF SCHOOL DAY		
Code—§ 1317	Compulsory attendance law	Prescribes that children shall attend nonpublic schools for the same length of time the public schools are in session.

Statute/Regulation	Description	Manner of Regulation
Code—§ 1501	Regulates number of school days	Requires public schools to be in session for a minimum of 180 days—thus nonpublic schools must be in session same length of time.
School Administrators' Handbook, Department of Public Instruction, Commonwealth of Pennsylvania, 111-000, August 5, 1968	Regulation implementing Code—§ 1501	Prescribes regulations for length of school year and school day; defines pupil instruction time and those activities not included; prescribes minimum class periods and hours.
Code—§ 1502	Relates to days schools are to be closed	Prescribes minimum number of holidays for all schools (public and nonpublic).
REGULATION AS TO REPORTING		
Code—§ 1332	Reports of enrollments, attendance and withdrawals	Requires nonpublic school administrators to furnish reports on attendance, absences, etc., of all students enrolled in nonpublic schools.
Regulation, State Board of Education, Commonwealth of Pennsylvania, Chapter 7 (supra) § 7-324	Annual Reports for continuing approval	Requires each secondary nonpublic school to submit annual report in such form as determined by the Department of Education. Report is reviewed for compliance with all Regulations. Approval of school may be revoked for failure to report.
REGULATION AS TO PENALTIES		
Code—§ 1333	Failure to comply with compulsory attendance law	Prescribes prosecution and penalty for parents or guardians who refuse to comply.
Code—§ 1355	Nonpublic school officials—failure to comply with code.	Prescribes prosecution and penalty for failure of nonpublic school administrators and teachers to comply with provisions of Code.

Regulation as to Health and Sanitation

Statute/Regulation	Description	Manner of Regulation
ode—§ 1303	**Vaccination**	
chool Administrators' andbook, Pennsylvania epartment of Education, 13-110, March 20, 1970;		Requires all students to be vaccinated against smallpox, imposes duties on school administrators relative to enforcement.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, hapter 3, Article 311.		
ode—§ 1402, *et seq.*	School health services (formerly known as Environmental Health Act)	Provides for medical, dental and school nurse services for all school children (including nonpublic).
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 3, Article 322	Health services	Regulation to implement health services.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 3, Article 333.		Regulations relating to school nurse services.
ct of April 23, 1956, P.L. 1510, as amended, 35 Pa. tat. Ann. 521.1 *et seq.*	Disease Prevention and Control Law of 1955	Imposes requirements as to sanitation, reporting, etc., on nonpublic school administrators.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 3, Article 355	Implements aforesaid statutory provision	
ct of April 9, 1929, P.L. 177, as amended, 71 Pa. tat. Ann. *et seq.*	The Administrative Code	Contains various provisions imposing requirements for health and sanitation in institutions, including nonpublic schools.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 4, Articles 412, 416, 442.	Rules and Regulations implementing the aforesaid statutory provision.	Imposes regulations relating to such matters as food services, waste and sewage disposal, insect and rodent control, swimmiing pools, etc. —provides for inspections.

Statute/Regulation	Description	Manner of Regula
Act of January 8, 1960, P.L. 2119, as amended, 35 Pa. Stat. Ann. 4001, *et seq.*	Air Pollution Control Act	Permits state authorit promulgate regulation air pollution control- lation can include sch permits entry and i tion of schools.
Rules and Regulations for Industrial Sanitation, 1966 Edition, Commonwealth of Pennsylvania, Department of Labor and Industry		Imposes extensive re tions relating to matte cleanliness—such as l tories (number, locati ventilation, wash basi dressing facilities, etc.
REGULATION AS TO BUILDING AND CONSTRUCTION		
Code—§ 734	Heating and ventilation requirement	Requires State Board of ucation to prescribe st ards for heating and ven tion of all school buildi
Act of April 27, 1927, P.L. 465, as amended, — Pa. Stat. Ann.		
Rules and Regulations for Protection from Fire and Panic, 1968 edition, Commonwealth of Pennsylvania, Department of Labor and Industry.	Safety requirements	Imposes extensive req ments for the construc and maintenance of sch —includes every facet o school building, includi type of materials to be u in construction, quality a quantity of fire-escapes stair wells, windows, fi alarm systems, class ro size and number of pup gymnasium, auditorium, a —provides for inspectio

Regulation as to Transportation

Statute/Regulation	Description	Manner of Regulation
...April 29, 1959, P.L. ... Pa. Stat. Ann. 101	The Vehicle Code	Prescribes extensive regulation over all aspects of pupil transportation, including transportation systems operated by nonpublic schools. Aspects regulated include: general qualifications of school bus operators, including age, fitness, competency, physical condition; minimum standards for school buses, including chasis, axles, braking system, electrical system, heating system, tires, etc.; bus body, emergency doors; safety features, such as use of flashing red lamps; special equipment for transporting handicapped children; registration plates and license fees; receiving and discharging passengers; number of passengers; disciplinary power and duties of school bus operators.
...lations, State Board ...ducation, Chapter 4, ... Transportation, ...t 30, 1967	Regulations relating to operation of school buses	

Regulation as to Labor Relations

Statute/Regulation	Description	Manner of Regulation
Act of January 17, 1968, P.L. — No. 5, 43 Pa. Stat. Ann., 333.101	Minimum Wage Act of 1967	Prescribes minimum w to be paid to certain per nel in nonpublic schools
Pennsylvania Minimum Wage Regulations, August 15, 1969, Commonwealth of Pennsylvania, Department of Labor and Industry	Implements aforesaid statutory provision	
Act of July 23, 1970, P.L. — No. 195, — Pa. Stat. Ann. —.	Public Employee Relations Act of 1970	Grants to all employees than clergymen and thos a religious profession— *inter alia*, "any nonpro . . . religious . . . edu tional . . . institution" right to organize (form unions) and to freely ch their representatives; re quires nonpublic schools negotiate and bargain w employee organizations; pr scribes employee rights; pr scribes unfair labor pra tices; confers the right strike and to picket; confe jurisdiction upon the Pen sylvania Labor Relations Board over labor disput between nonpublic school employees and nonpublic schools.

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SUPPLEMENT D

COMMONWEALTH OF PENNSYLVANIA

July 1, 1970

PNESEA Informational Memorandum

Requesting Agencies; Organizations

Vincent J. McCoola, Director
Office for Aid to Nonpublic Education
Department of Education

On June 1, 1970, the Office for Aid to Nonpublic Education successfully completed the first administrative cycle in the implementation of Act 109. As a result of this milestone in aid to nonpublic education, the Office for Aid to Nonpublic Education has received many inquiries concerning the status and continued implementation of the Pennsylvania Nonpublic Elementary and Secondary Education Act. In order to service requesting agencies in a uniform manner, it was decided that a capsulized summarization of the year's activities developed in memorandum form would provide a vehicle whereby we might service requesting organizations.

The Commonwealth of Pennsylvania and this Office now enters the third year of operation under PNESEA, a program that has been marked by excellent cooperation between the public and nonpublic educational sectors in Pennsylvania. The entire administrative structure was developed on the premise of cooperation and professional enthusiasm which was necessary because the Office for Aid to Nonpublic Education and Act 109 had no precedent since it was a pioneering effort.

The second operational year of PNESEA, just completed, witnessed the participation of 1,178 nonpublic institutions in the program resulting in the purchase of secular educational services for 535,215 Pennsylvania resident students.

This Office has adhered to its May 15 deadline for the submission of approved claims from participating institutions, and the staff is currently processing these

claims in preparation for the next quarterly payment on September 1, 1970. This payment will represent the first quarterly payment to participating institutions for the operational or academic year of 1969-1970.

As we conclude the second year of administering the Pennsylvania Nonpublic Elementary and Secondary Education Act, two observations are readily evident:

1. The administration of Act 109 has operated smoothly with excellent educational rapport and an excellent record of cooperation between Commonwealth education officials administering the Act on behalf of the Department of Education and the administrators of more than 1,100 nonpublic schools in this State.

2. Evidence and substantiating correspondence describes Act 109 as an instrument that provided substantial aid to the total spectrum of education in Pennsylvania.

In support of the initial conclusion, it must be pointed out that this Office in 1968 established the administrative machinery capable of effectively and economically consummating the purchase of secular educational service for nonpublic institutions in the Commonwealth of Pennsylvania. An appreciable amount of effort preceded the establishment of the functional administrative unit, and the procedure has been documented by the joint preparation of Rules and Regulations, position papers, instructional memoranda, and the conduct of instructional seminars in six geographic sections of the Commonwealth of Pennsylvania.

In order to assist the Director of the Office for Aid to Nonpublic Education, the Secretary of Education elected to appoint an Ad Hoc Advisory Committee whose membership includes:

Mr. John R. Batley, Business Manager
Westtown School

Dr. William W. Brickman
University of Pennsylvania

Mr. Darl Callen, Director
Bureau of Public Assistance Disbursements
Treasury Department

Dr. William L. Charlesworth, Director
Bureau of Faculty and Student Services
Department of Education

Monsignor Homer C. DeWalt
Diocesan Superintendent of Erie Schools

Benjamin Frank, Esq.
Deputy Attorney General
Department of Justice

Monsignor Edward T. Hughes
Diocesan Superintendent of Philadelphia Schools

Mr. Norrece T. Jones, Business Manager
Cheyney State College

Dr. John E. Kosoloski, Director
Bureau of General and Academic Education
Department of Education

Mr. M. Stanford Lapayowker, Principal
Lincoln College Preparatory School

Rabbi Abba Leiter
Pittsburgh, Pennsylvania

Mr. Mervin E. Manning, Assistant Comptroller
Bureau of School Accounting and State Subsidy
Department of Education

Mr. James H. McK. Quinn, Headmaster
The Episcopal Academy

Mr. John F. Bray, Director
Bureau of School Audits
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The Office for Aid to Nonpublic Education constantly endeavors to expose the Committee to problems before developing policy decisions. Meetings are open to discussion by the membership and professional good judgment is always

considered. Since the membership of the Ad Hoc Advisory Committee represents a composite cross section, together with Department of Education professional expertise, these deliberations result in procedures which are compatible, effective, professional, and within the framework of the Act, a sincere attempt to fairly and properly implement the legislation.

Despite the early difficulties encountered in establishing the Office, after the basic foundations of good management were applied and the professional advice of many sectors sought and received, the current administration of PNESEA is neither cumbersome nor oppressive nor static. Our initial effort of good administrative service was rewarded by a minimal number of complaints directed to the operation of the program. It may be generally concluded, as evidenced in the Philadelphia Inquirer article dated June 8, 1970, that the administration of PNESEA was "tough but fair".

The instructional seminars launched during the first year of operation dissipated any overt criticism since a sincere effort was made to educate "participating administrators in the new experience of completing government forms". An appreciable amount of time was spent in policing, while processing the forms; and a reasonable amount of attention was given to mechanical details. The second year of operation resulted in a smooth submission cycle and processing program.

It may be said that the present administrative structure of PNESEA is a smoothly functioning operation with little or no extenuating criticism. A certain portion of administrative time is directed to future planning, programming, and improvement.

Relative to the second conclusion, we have been apprised by both the nonpublic school administrators and various interested citizens and organizations of the Commonwealth regarding the substantial educational advance which this epochal program has marked. Because of the quality incentives and program stimulation written into PNESEA, evidence of upgraded nonpublic education in some needed instances has been noted resulting in much favorable comment.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1969.

No. [redacted] 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee,

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS.

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STATEMENT OF THE CASE.

Appellants, plaintiffs below, brought an action before a three-judge District Court challenging the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act (the Act), 24 P. S. § 5601 et seq., which authorizes the Superintendent of Public Instruction to purchase secular educational services in four defined secular subject areas [1] from nonpublic schools,[2] for the benefit of nonpublic school children.

The Preamble, Legislative Findings, and Declaration of Policy in the Act accurately describe the present crisis in elementary and secondary education existing in Pennsylvania and the nation, and the role played by nonpublic schools in alleviating this educational emergency. In response to this crisis and in recognition of the invaluable assistance of the nonpublic schools in furnishing secular instruction to the more than twenty percent of Pennsylvania's youth who attend nonpublic schools (24 P. S. § 5602(2)), the Legislature enacted the statute now before the Court.

Appellees, defendants below, filed a Motion to Dismiss the Complaint. The Pennsylvania Association of Independent Schools, an association of 94 accredited elementary and secondary schools which includes in its membership almost all of the independent schools in the state, moved to intervene as a party defendant. This Motion was granted for purpose of argument on the Motion to Dismiss without prejudice to the Association's application for more general

1. The Act only authorizes such purchase in mathematics, modern foreign languages, physical science, and physical education. 24 P. S. § 5604.

2. Nonpublic schools are defined in the act as ". . . any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law." 24 P. S. § 5603(4).

intervention after disposition of the Motion to Dismiss (A. 53).

After extensive briefing and oral argument, the Court, in an opinion by Troutman, J., joined in by Luongo, J., sustained the Motion to Dismiss. The Court held, *inter alia*, that the organizational plaintiffs lacked standing on all issues in the Complaint, that none of the plaintiffs had standing to challenge the statute under the Equal Protection Clause of the Fourteenth Amendment, and that, on its face, the statute conformed to the commands of the Free Exercise and Establishment Clauses of the First Amendment (A. 100).

Judge Hastie filed a dissenting opinion in which he held that the Motion to Dismiss should be denied as to the Establishment Clause allegations (A. 101-112). However, Judge Hastie concurred in the Court's holding that none of the plaintiffs had the requisite standing to challenge the statute under the Equal Protection Clause and that this portion of the Complaint be dismissed (A. 111).

SUMMARY OF ARGUMENT.

Under any of the stated tests for determining the constitutionality of a state program under the Religion Clauses of the First Amendment, the Pennsylvania Act passes constitutional muster.

In enacting this program into law, the Legislature expressly recognized that a financial crisis now grips elementary and secondary schools. Echoing this Court's findings in *Board of Education v. Allen* (392 U. S. 236 (1968)), that nonpublic schools provide invaluable assistance in educating our youth in secular subjects, the Legislature authorized the state to purchase secular services from nonpublic schools, which presently educate over twenty percent of the Commonwealth's children. Thus, the Act obeys the Constitution's command of governmental neutrality toward religion, since its primary purpose and effect is to further secular education.

By designating a broad and reasonable class of nonpublic schools who may participate in the Act's program, which class includes church and non-church related schools, the state has not used religion as its standard for action. Rather, the state has taken swift and required action to preserve secular educational opportunity and pluralism in our society. Administered within its stated narrow limits, the Act will not lead to governmental establishment of religion.

In the absence of any properly pleaded allegation of fraud by the Legislature in passing the Act, the lower court correctly held that the purpose of the Act was clear on its face, and that the court could not lightly set aside the legislative declarations and findings which clearly support the Act's secular purposes. Further, any doubt as to the constitutionality of the Act should be resolved in favor of its validity, particularly in view of the strong public

interest, as evidenced by extensive state action in this area, to preserve and improve the high quality of private education. This Court should now affirm the lower court's judgment that the Act complies with all First Amendment commands.

As to Fourteenth Amendment claims, the lower court unanimously found that all of the plaintiffs below lacked standing to raise these issues. Plaintiffs below could not point to any interest which would justify their attempts to challenge the Act under the Fourteenth Amendment. This Court should now reaffirm its long standing commitment to the standing doctrine by upholding the judgment of the lower court on this issue.

ARGUMENT.

I. The Meaning of the Establishment Clause.

The principal issue raised by this appeal can be simply stated:

> Does the First Amendment of the U. S. Constitution prohibit a state from using public funds to contract with nonpublic schools for teaching certain designated, secular, non-religious courses to the more than twenty percent of the state's youth who attend nonpublic, independent, or sectarian schools which meet state standards for compulsory education?

We submit that the principles contained in prior First Amendment decisions of this Court, from *Everson v. Board of Education* (330 U. S. 1 (1947)) to *Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970), unequivocally support the constitutionality of the Pennsylvania statute. The District Court faithfully heeded the dictates of this Court in upholding the statute's constitutionality and the judgment of the lower court should now be affirmed.

This Court has most recently examined the meaning of the Establishment and Free Exercise Clauses in *Walz v. Tax Commission of the City of New York, supra.* Speaking for the Court, Mr. Chief Justice Burger eloquently described the purposes behind the Religion Clauses of the First Amendment, and the difficult and delicate task faced by the Court in applying these principles:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have

> been calculated; but the purpose was to state an objective, not to write a statute. * * * 397 U. S. at 668. The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. 397 U. S. at 668-9.
>
> * * *
>
> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U. S. at 669.

Individual Justices of the Court have given shape to these First Amendment objectives most recently expressed in *Walz* by constructing various tests by which the constitutionality of a statute can be judged. See opinions of the several Justices written in *Everson v. Board of Education*, 320 U. S. 1 (1947); *Abington School District v. Schempp*, 374 U. S. 203 (1963); *Board of Education v. Allen*, 392 U. S. 236 (1968); *Walz v. Tax Commission*, 397 U. S. 664 (1970). Measuring the Pennsylvania Act by any of these standards expressive of First Amendment objectives produces the same, unequivocal result—that the stat-

ute does not violate the principles of constitutional neutrality toward religion embodied in the First Amendment, since it is clear from the face of the Act, that its primary purpose and effect is not to aid religion, but to further secular education.

The National Association of Independent Schools, appearing as an Amicus in this proceeding, has analyzed, in depth, the Pennsylvania Act in light of each of these stated tests and points out that the Act clearly passes constitutional muster by every test advanced by all the Justices of this Court. (See Brief of National Association of Independent Schools.) We wholeheartedly concur in this analysis by the National Association, which is summarized in the sub-paragraphs below:

1. In *Walz* the Chief Justice stated the original purpose of the Religion Clauses: "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and a close involvement of the sovereign in religious activity." 397 U. S. at 668. The Act is constitutional under the *Walz* test because it cannot be deemed to constitute sponsorship, financial support and active involvement of the state in religious activity. Benefits under the Act are available to a broad and reasonable category which includes all accredited nonpublic schools in the state, regardless of religious affiliation.

2. The Act will not lead to excessive governmental entanglement with religion. Since the celebrated decision in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), it has been recognized that the state may not compel children to attend public schools. Children must be allowed to attend nonpublic schools of their

choice, subject to the state's right to impose certain educational standards on these schools.

3. Pursuant to this constitutional doctrine, Pennsylvania has enacted various statutes setting forth mandatory educational requirements. See, e.g., The Public School Code of 1949, as amended, 24 P. S. § 15-1511, § 16-1605. The Pennsylvania Act will not lead to any more significant state involvement in nonpublic educational affairs than already and constitutionally existed before its enactment. (For a detailed analysis of *Pierce* and the constitutionality of state aid to nonpublic schools see, Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. R. 260, 328-9 (1968).)

4. The state may only contract for services in defined secular subject areas so that it will not become entangled in religion, this Court having already recognized that the nonpublic schools perform two separate educational functions—religious and secular. See *Board of Education v. Allen*, 392 U. S. at 247-248.

5. As in *Allen*, the Act has as its primary purpose and primary effect the advancement of the secular education of the state's youth who choose to attend nonpublic schools (See Opinion of the District Court, A. 92-97). In addition, by limiting state participation to four secular subject areas, substantially greater barriers to sectarian involvement are present here than in the *Allen* statute where no such limitations existed.

6. Contrary to Appellants' position, *Allen* does not rest on a requirement that funds be paid directly to the child benefitted by the program in question. The iden-

tity of the payee of the check cannot determine the constitutionality of an Act designed to aid children in obtaining secular education in qualified schools. (See District Court Opinion, A. 97).

7. The Act, limited on its face to contracts for *secular* educational services, does not serve *essentially* religious activities of religious institutions, employ the organs of government for *essentially* religious purposes or use *essentially* religious means to serve governmental ends where secular means would suffice. *Schempp* at 294-5 (Brennan, J., concurring).

8. The secular limitations in the statute also prevent the state from giving support to proselytizing activities of religious sects. (Stewart, J., dissenting in *Schempp*, 374 U. S. at 314.)

9. By designating a broad, reasonable class which encompasses all nonpublic schools, church and non-church related under the Act, the state has not used religion as its standard for action or inaction, and has, thus, obeyed Mr. Justice Harlan's standard of state neutrality to religion. At the same time, by enacting this statute, the State has helped to preserve pluralism, a value highly prized in American society in general, as well as in our educational system in particular. See *Allen*, 392 U. S. at 247-8.

Thus, under any stated test, the Act stays within the constitutionally imposed limits of neutrality toward religion. Administered within its narrow, secular limits, the Act will benefit a broad class of pupils in Pennsylvania and foster continued educational excellence. For these reasons the judgment of the lower court should be affirmed.

II. The Act Promotes the Quality of Secular Education Available to the Youth of Pennsylvania.

In its opinion, the lower court followed the line of Supreme Court cases which declare that legislation enacted to further the education of our children is in the public interest, and that the state may look to nonpublic schools as a proper instrument for effectuating the public's interest in quality education.

> "The education of our nation's children quite properly has been recognized by the Supreme Court as a proper subject of legislation enacted in furtherance of a public interest. *Cochran v. Board of Education*, 281 U. S. 370 (1930). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning; rather, educational goals may effectively be satisfied through private education. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). As a sensible corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory education laws through private educational institutions, the *Allen* Court observed:
>
> > [I]f the State must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular educational function. 392 U. S. at 236." (Opinion of the District Court, A. 93.)

The Pennsylvania Act, in its Preamble, Declaration of Policy and Findings, echoes the Court's recognition in *Allen* that we as a nation greatly prize quality education, and that private schools play a significant role in achieving and preserving educational excellence.

The public interest is certainly served by preserving the high quality of private education. The Court in *Allen* made the following observations on these points:

> ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children.
>
> They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create.
>
> Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." (392 U. S. at 247-8.)

Lest there by any doubt as to the legitimate public interest in and public purpose of Act 109, see the Legislative Findings and Declaration of Policy of The Act, summarized below:

a. *Financial Crisis*—There is a serious financial crisis in the nation and in Pennsylvania among nonpublic elementary and secondary educational schools.

b. *Relief of Public Burden*—Nonpublic institutions bear the burden of educating twenty percent of our young people—and thereby relieve the taxpayers of a very significant public burden of additional expense.

c. *Secular Public Purpose*—The purpose of the Act is to promote secular education. Nonpublic

schools, through instruction in secular subjects, perform an important public purpose.

1. The Significant and Unique Role of Independent Education.

"I believe that the independent preparatory schools have a significant role in American education. Nothing has helped the independent schools more than the fact they have produced so many national leaders who saw beyond the horizon of their own life. The careers of such men have done more than anything else to make our democracy accept the value of the independent schools."

JOHN F. KENNEDY, *President of the United States of America* in address to Choate School, Wallingford, Connecticut in 1963.

Not only has independent education made a significant contribution to the national interest in contributing vast numbers of well educated, highly motivated leaders in business, the professions and public service,[3] but independent education because of its greater freedom from governmental and bureaucratic controls has been freer to experiment and innovate in new methods and areas of education. Its successes have provided leadership and healthy competition for public education and vice versa. Each in a sense complements the other and gains strength from the interaction between the two.

Independent schools also preserve and further our nation's commitment to a general philosophy of pluralism

3. We would submit that it is not just accident that two of the most imaginative and visionary leaders in government of this century were products of the independent school system—Franklin Delano Roosevelt and John F. Kennedy.

which is essential to the preservation of freedom in a democratic society.

From the early days of the Republic, Americans have formed private associations for myriad purposes. These associations have been the well-springs for creativity in our society and have preserved our commitment to pluralism and equality. Examining this uniquely American phenomenon, Alexis deTocqueville commented on its importance to a democratic society, which still holds true to this day:

> Thus the most democratic country on the face of the earth is that in which men have, in our time, carried to the highest perfection the art of pursuing in common the object of their common desires and have applied this new science to the greatest number of purposes. Is this the result of accident, or is there in reality any necessary connection between the principle of association and that of equality?
>
> Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America. The political and industrial associations of that country strike us forcibly; but the others elude our observation, or if we discover them, we understand them imperfectly because we have hardly ever seen anything of the kind. It must be acknowledged, however, that they are as necessary to the American people as the former, and perhaps more so. In democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made. DeTocqueville, *Democracy in America,* Henry Reeve text, revised by Francis Bowen.

Independent schools represent one important phase of this American commitment to associations and pluralism,

and their continued existence is vital to the preservation of creativity and freedom in our society.[4]

Thus, even aside from the very substantial additional cost that would result if the burden of nonpublic education were dumped on the taxpayers, the above educational and philosophical considerations alone would more than justify action by the legislature to give financial aid to help forestall the stifling effect that removal of nonpublic education would have on our total educational scheme.

The United States Commissioner of Education, Harold Howe, II, in an address to the National Association of Independent Schools, on March 4, 1967, said:

> "You [independent schools] can experiment with new course offerings that would arouse strong resistance if put forward by the public schools. As an example, I think independent schools have taken a commendable step forward with their decision to introduce major programs of sex education. Your independence, then, gives you the freedom to shape an educational experience which is often superior to that available in many public school systems."[5]

Harold W. Dodds, former President of Princeton University, has made an eloquent statement on the case for independent education.[6] Stressing its primary function as the preservation of freedom, he stated:

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4. See also, "Message From President Nixon on Education Reform to the Congress—March 3, 1970":

> "The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results." 91st Congress, 2d Session, House of Representatives Document No. 91-267.

5. The Independent School Bulletin, May, 1967, 14, 15.

6. Speech delivered at Springside School, Philadelphia, on April 2, 1964—reported in *Springside Briefs*, Volume 1, Issue No. 5, page 1.

"Although today the independent schools educate but a small fraction of our youth of pre-college age, my belief that they must survive and prosper roots in a general political philosophy about freedom in general; particularly in what such schools contribute to freedom as well as to education. It is no shock to remind you that the last generation has been featured by a great expansion in the size and scope of government all over the world."

He went on to point out that our freedom in education, as in other areas, depends on a pluralistic society, opposed to an all embracing monolithic structure. Stressing the importance of healthy competition with government, he stated:[7]

"Nothing is clearer to me than the principle, enunciated by Lord Acton, that liberty is possible only in a society in which there are strong voluntary and independent centers of action and opinion outside of government. No matter how honest, well-intended and expert our government official may be, we cannot resign our civic and social responsibilities to any political body or to any autocracy of administrative experts, even experts in education. The notion that they are in a better position than the people generally to make basic public decisions for us, or to administer them

7. John W. Gardner, former Secretary of Health, Education and Welfare has more recently, in a stirring article entitled "What Kind of Society Do We Want?" (*Readers Digest*, Sept. 1969), emphasized the danger of too much reliance on public institutions. Commenting on the qualities a society needs for self-renewal, he states: "First of all, it would be characterized by pluralism, by variety, alternatives, choices and multiple foci of power and initiative." Later, he too stresses the role of education: "The society capable of continuous renewal will be one that develops to the fullest its human resources, that removes obstacles to individual fulfillment, that emphasizes education, life long learning and self discovery."

when made except under popular controls, is an egregious myth."

But as Dr. Dodds points out, to be effective, the competition must excel—and this costs money:

"Most decidedly the case for the independent schools is not to be found simply in the opportunity which they enjoy to be independent; they will be judged in the last analysis by what they do with their independence. They achieve their basic purpose only as they achieve excellence. And excellence in any line, including education, costs money and the money must come from the pocketbooks of individuals who are already paying taxes to support public education."

Dr. Dodds' emphasis on the public interest, which we as a people have in the healthy survival of the independent school as a leader and as a yardstick against which may be measured the quality of public education, is particularly germane:

"Therefore, one chief reason that the independent schools must prosper exists in the freedom they have to concentrate on a mental muscle—stretching education for those able to receive it, to uphold the banner of the well-educated mind in a sound personality and a sound body.

Remember that the independent schools, as they honestly strive for excellence, influence the public school system by inspiring a spirit of emulation, as the private university has inspired the state university, a proposition with which most presidents of state universities will agree.

On the other hand, the public schools, particularly when they are good, afford healthy competition for the independent schools and remind the latter of their constant obligation to serve our democracy well, and not merely a particular segment of our population."

2. The Financial Crisis.

Appellants have charged in their Brief that ". . . few, if any, of the traditional, high tuition, exclusive private academies are in any sense in need of state subsidy in order to continue teaching, and teaching very well, mathematics, foreign languages, physical sciences and physical education (Appellants' Brief, p. 35). In an attempt to support this charge, Appellants have gone outside of the record to introduce unsworn to allegations about the endowment and physical facilities of one independent school which is receiving payments under the Act (See n. 11 at p. 34 of Appellants' Brief).

Even though such statements are based on allegations not of record and even though Appellants have flagrantly violated Rules of this Court in introducing such irrelevant material (See Rule 40(5)), PAIS cannot permit Appellants the luxury of making such false and unfounded statements.

One school out of hundreds of independent schools in the state may have a sizeable endowment but such a situation is the exception, not the rule. It is a matter of common knowledge of which this Court may take judicial notice that independent schools are now facing a grave economic crisis which is exacerbated by current inflationary trends in the nation's economy. Without some form of state assistance, independent schools, faced with spiralling costs, would be forced to boost tuitions to such a level that would inevitably price these schools into practical extinction.[8] In order to preserve its scholarship programs and its general philosophy of serving a wide social and economic cross-section of the community, the independent school must be

8. "In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools." Message of the President on Education Reform, *supra*.

offered the opportunity to participate in programs such as the one now before this Court.

Theodore R. Sizer, Dean of The Harvard Graduate School of Education has stressed the acute financial crisis facing nonpublic schools and the risk spiraling costs could have on scholarship aid to provide a varied student body. He said:[9]

> "How to finance this necessary and responsible increased cost? In my judgment the average independent school will not be able to increase its income the requisite amount and still hold tuition down low enough to provide for a varied student body. The only recourse is public funds, and I am prepared to argue that support of private education is in the public interest. Public education needs competition the pace setting and goading which strong independent schools might provide."[10]

Speaking on the importance of public funds to aid private education, United States Commissioner of Education Harold Howe said on the same date:

> "We will see more, rather than less, Federal aid to education in the years ahead for two reasons:
>
> First, the Congress knows that State and local funds alone cannot buy the kind of education we need to prepare students for a technological society and for a world beyond our shores that is infinitely more complex today than it was two decades ago.
>
> Second, a genuinely democratic society cannot tolerate the inequable distribution of quality that characterizes our State education system."[11]

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9. Address before the Teacher Training Section of the National Association of Independent Schools, March 4, 1967.

10. Independent School Bulletin, May 1967, 19, 21.

11. Independent School Bulletin, May 1967 at 17.

3. Relief of Public Burden.

That nonpublic education relieves the taxpayer of a very substantial financial burden, is a fact not subject to question. It takes few calculations to demonstrate the tremendous financial burden, both as to annual operating expenses and capital expenditures for physical plant, that would be thrust on the taxpayers if it were not for the nonpublic schools.

Thus it has been estimated that out of the total annual expenditure of $1,629 billion dollars by the Commonwealth and nonpublic schools for all elementary and secondary education in 1967, $400 million represented the value of the contribution for nonpublic education.[12]

Estimates on the capital costs of building new facilities to accommodate the additional pupils now in nonpublic schools could run as high as $1.2 billion.[13]

In light of such overwhelming judicial authority, cumulative findings, and strong pronouncements of prominent leaders and educators, we wonder how anyone could seriously challenge the unassailable proposition that there is a public purpose served when the state seeks to support qualified nonpublic educational institutions with state funds.

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12. This figure was determined by multiplying the estimated cost per pupil ($637) by the number of students (627,000).

Source: *Statistics of Public, Elementary and Secondary Schools —U. S. Department of Health, Education and Welfare, Fall, 1967.* Table 12, p. 26; and see *"Public School Financial Statistics Report* 1967-68" Vol. 8, No. 7, 1969, p. 2.

13. This additional capital cost is computed by multiplying the estimated capital cost per student ($2,000) by the number of students (627,000).

Source: "An appraisal of the Pennsylvania School Subsidy System" (prepared for the Superintendent of Pa. Dept. of Public Instruction by the State Division of the Pa. Economy League, Inc., July 1968, p. 6).

III. The Lower Court Did Not Err in Holding That the Primary Purpose and Effect of the Act Does Not Aid or Inhibit Religion.

In ruling on the Motion to Dismiss, the lower court accepted as true all the well-pleaded allegations of fact in the Complaint. However, the court quite properly did not accept as a fact plaintiffs' self-serving statement that the primary purpose and effect of the Act was to aid religion. Rather, the court followed the well-established rule that legal conclusions drawn from pleaded facts are not deemed admitted on a Motion to Dismiss. *Newport News Co. v. Schauffler*, 303 U. S. 54, 57 (1938) (A. 88).

The court below went on to hold that the purpose of the Act was clear on its face—to promote the welfare of the people of the Commonwealth and promote the secular education of children attending nonpublic schools, as stated in the Legislative Declaration of Policy and as supported by the Legislative Findings (A. 91-92). The court also held that within the narrow confines of the Act, ". . . neither the primary nor the necessary operative effect of the statute advances religion." (A. 95).

Appellants now argue that the lower court erred by not considering the legislative history of the Act in assessing its constitutionality. They contend that the Legislature's Findings and Declaration of Policy are so much "window dressing"—and that the Legislature had attempted to deceive the public—because its real purpose was, in effect, to aid the Catholic Church and its educational program (Appellants' Brief, 24-25). This is tantamount to a charge of fraud by the legislature, although plaintiffs' complaint is devoid of any allegations or specific charges of fraud and deception. Thus, Appellants urge this Court to ignore the findings of the trial court, to pierce the alleged veil of deception, and thereby unmask the Legislature's unconstitutional purpose for enacting the Act.

However, Appellants' argument runs afoul of basic rules of federal pleading and the policy enunciated by this Court that legislative findings are not to be lightly set aside on the assumption that a wrongful purpose or motive caused the Legislature to act. *McCray v. U. S.*, 195 U. S. 27, 56 (1904); *McGowan v. Maryland*, 366 U. S. at 469 (Frankfurter, J.); *U. S. v. O'Brien*, 391 U. S. 367 (1968).

Furthermore, Federal Rules of Civil Procedure 9(b) provides that fraud must be pleaded with clarity and great particularity:

> "(b) *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Appellants in their Brief have, in effect, charged the Pennsylvania Legislature with fraud, but such allegations, or the specificity required under FRCP 9(b), are conspicuously absent from the Appellants' Complaint. Absent such allegations the lower court, on a motion to dismiss, had no basis or reason to doubt the sincerity and propriety of the legislative findings and declarations which declare and support the secular purpose of the Pennsylvania Act.

Under such circumstances, the lower court correctly heeded this Court's admonitions against attributing Machiavellian motives and purposes to a legislature which has made findings and declarations that support the statute's constitutional purpose.

In *U. S. v. O'Brien*, the Court reaffirmed this fundamental policy which embodies the sound philosophy of judicial restraint in evaluating the constitutionality of legislative actions. When the meaning of a statute is ambiguous, the Court in *O'Brien* said that the trial court should look to

legislative history to ascertain the legislature's intent. 391 U. S. at 383-4. However, no party to this action has ever contended that Act 109 is ambiguous. In all other cases, the Court should not question the declared constitutional purpose of a statute, unless it is clear that its *inevitable* effect contravenes the Constitution. 391 U. S. at 384-5.

The Court in *O'Brien* cited two previous cases where the Court properly pierced a veil of legitimacy surrounding a statute because the statute would lead to an inevitable unconstitutional result. In *Grosjean v. American Press Co.*, 297 U. S. 233 (1935) and *Gomillion v. Lightfoot*, 364 U. S. 339 (1969), a cursory examination of the statutes in question revealed that both statutes under attack would inexorably deprive individuals of Constitutional rights. In *Grosjean*, a tax on periodicals based upon circulation could have no other effect than casting a chilling shadow on free speech. The gerrymander statute under attack in *Gomillion* had the inevitable effect of disenfranchising one identifiable group—blacks living in one section of Tuskegee, Alabama. Thus, the Court in analyzing *Grosjean* and *Gomillion* declared:

> "These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional." 391 U. S. at 394.

However, in this action, as in *O'Brien*, the statute under consideration does not have one inevitable, unconstitutional effect. The Act offers benefits to a wide class of schools that embraces sectarian and non-sectarian schools alike. If the New Jersey statute in *Everson* is constitutional, surely this open-ended statute, which is founded on sincere and honest legislative findings, is also worthy of constitutional protection.

A close reading of this Court's opinion in *Allen* should dispel any remaining doubt that the lower court was correct in refusing to overturn the Legislature's findings. The legislative findings and declaration made in support of the New York book statute were accepted as true expressions of legislative purpose by the lower court as well as by this Court:

> "The express purpose of Section 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." 392 U. S. at 243.

Appellants, however, ignore these principles that support the lower court's judgment and instead argue that validation of the Pennsylvania Act will automatically place the imprimatur of constitutionality on efforts of former de jure segregation states to support private, segregated academies with an eye to circumventing desegregation orders (Appellants' Brief p. 28). Such an inflammatory argument simply falls apart upon analysis of the factors in this case:

First, Plaintiffs challenging a statute always have it within their power to allege legislative fraud or a devious scheme to evade Constitutional mandates with clarity and particularity as required by rules of pleading. Plaintiffs in this case failed to avail themselves of this right.

Secondly, courts have the power to invalidate statutes whose inevitable effect is to violate the Constitution, *U. S. v. O'Brien, supra*. The fact that the statute in this case does not fall within this standard does not in any way impair the strength of that Constitutional command.

Thirdly, this Court has consistently taken the position that states which formerly followed a policy of state-required and state-enforced segregation in schools are under an affirmative duty to dismantle that system and desegregate their schools. *Brown v. Board of Education*, 347 U. S. 483 (1954); *Brown v. Board of Education*, 349 U. S. 294 (1955); *Cooper v. Aaron*, 358 U. S. 1 (1958); *Griffin v. County School Board*, 377 U. S. 218 (1964); *Green v. County School Board*, 391 U. S. 430 (1968); *Alexander v. Holmes*, 396 U. S. 19 (1969). In evaluating every desegregation plan, the courts must analyze it against the state's past history of required segregation. *Green v. County School Board*, 391 U. S. at p. 437-438. This Court has already invalidated ingenious efforts by de jure states to emasculate desegregation orders by financing "private" all-white schools (*Griffin v. County School Board, supra.*), and we have no doubt that the *Griffin* result would not be effected by clever alterations in the unconstitutional scheme.

Finally, an aggrieved individual who has been discriminated against always has it within his power to bring a specific action against the school or schools who are guilty of such unlawful practices. Furthermore, the Internal Revenue Service recently announced that private schools which follow racially discriminatory admissions policies will no longer be granted tax exempt status, and that contributions to such schools will no longer be tax deductible. 1970 P. H. Fed. ¶ 21,016 (News Release 7-10-70), Prentice-Hall Federal Taxes Report Bulletin, Vol. LI, No. 29, ¶ 55,209.

By contrast, Pennsylvania's history is not stained by the shameful mark of state-required segregation. Private schools in Pennsylvania were not formed in order to keep the races separated by walls of discrimination and prejudice. The independent schools in Pennsylvania are not, contrary to Appellants' unfounded charges, segregated in-

stitutions. Rather, as more fully discussed in Section V. of the Brief, they serve a wide spectrum of individuals in the community, including an ever-increasing number of black students. Based on such well-known facts, Appellants cannot say that the approval of the Pennsylvania Act lends constitutional support to efforts of formerly segregated states to evade their duty to dismantle long-standing segregation systems.

IV. Any Doubt as to the Constitutionality of the Pennsylvania Act Should Be Resolved in Favor of Its Validity.

Any doubt as to the constitutionality of the Pennsylvania Act should be resolved in favor of its validity, particularly in view of the strong public interest, as evidenced by extensive state action in this area, to preserve and improve the high quality of private education.

This Court has on many occasions held that its power to declare state programs unconstitutional should be sparingly exercised. *Walters v. City of New York,* 347 U. S. 231 (1954); *New York v. O'Neill,* 359 U. S. 1 (1959). Judicial interference with legislative action on grounds of unconstitutionality should be exercised with great care and only in compelling circumstances. *Walters v. City of New York, supra.*

Thus, any doubt as to the constitutionality of the Act should be resolved in favor of permitting the state to aid nonpublic education; and this is particularly so in light of the ever-increasing concern and demand at both national and state levels for high quality nonpublic education.

On the national level see, for example, the following excerpts from President Nixon's Message to Congress, charging the Commission to Study Education Reform (see copy attached as Exhibit A to this Brief):

> Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. * * *
>
> *If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities.*
>
> * * *
>
> In its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that nonpublic schools in America are closing at the rate of one a day. (Emphasis original.)
>
> 91st Congress, 2d Session, House of Representatives, Document No. 91-267 (March 3, 1970).

At the state level, there has been even greater activity in response to the widespread public demand for the kind of high-quality private education referred to by Mr. Justice White in the *Allen* majority opinion. (See statement from 392 U. S. at 247-8 quoted in this Brief at page 11). A statistical summary, attached as Exhibit B to this Brief, indicates that, to date, some thirty-one states have either enacted, or have under serious consideration, legislation to provide various forms of aid to nonpuplic education, thus demonstrating the strong determination of the states to develop innovative and constitutionally permissible programs to aid secular education through private institutions.

Such experimentation by the various states is a direct by-product of our nation's federalist system in which the

states serve as laboratories for creative change. As long as there is no curtailment of religious liberty, the First Amendment, as applied to the states by the Fourteenth, should not be interpreted so as to restrict the freedom of the states to respond creatively to the ever-changing problems of their peoples. As developed in Section II of the Amicus Brief of the National Association for Independent Schools, the states should have greater freedom to aid even religious institutions, in ways that might be foreclosed to the Federal Government since restrictions under the First Amendment are made applicable to the states only by virtue of the Fourteenth Amendment. As Mr. Justice Harlan, concurring in *Walz* stated:

> It may also be that the states, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government. 397 U. S. at 699.

In light of this valid distinction between the powers of Congress and the states to develop programs that must meet First Amendment commands of neutrality, it is clear that in a case such as this, one seeking to set aside the action of a state legislature has an even heavier burden than in the case of an Act of Congress.

Clearly, Appellants have not met this burden and their appeal should now be dismissed.

V. The Lower Court Was Correct in Finding That All Plaintiffs Lacked Standing to Raise Claims Under the Equal Protection Clause.

The court below unanimously found that all plaintiffs lacked standing to challenge the Act under the Equal Protection Clause (A. 86-87; A. 111).

As to the organizational plaintiffs, it is clear that the complaint fails to establish the requisite personal stake in the outcome of the controversy to confer standing upon these groups as required by *Flast v. Cohen*, 392 U. S. 83 (1968). The organizational plaintiffs are not alleged to be taxpayers generally or specifically under the statute, nor is it alleged that they are suing on behalf of their members who may be taxpayers. Clearly, such organizations cannot meet the standing requirements of the federal courts to press any claims in this action.

As to the individual plaintiffs, they have all failed to establish even a prima facie logical connection between their status as taxpayers and the statute attacked and the type of alleged constitutional infringement, as is required to meet standing requirements, 392 U. S. at 102-3. Two of the plaintiffs failed to allege that they even paid the tax imposed by the statute in question (A. 86), so that they are not even within the class of affected taxpayers. Nor have these two plaintiffs pointed to any other interest to confer standing on them (A. 87).

Plaintiff Lemon, who did pay the tax in question, (A. 57), attempts to establish his standing by alleging that he is a Negro and a parent of a child who attends a Pennsylvania public school (See ¶ 6 of Complaint, A. 10). However, several vital links are missing from his pro-offered standing chain. Lemon fails to allege that he is suing on behalf of his child, or other similarly situated children, so that he is incapable of pressing their alleged claims in this action. Secondly, even if Lemon could raise his child's claims, he fails to allege that he or his child have been discriminated against by the state or any schools who contract with the state pursuant to the statute. Lemon raises no claim that his child's school is now, as a result of the statute, segregated or in danger of becoming segre-

gated. Under such circumstances, the wise policy of standing forbids the federal courts from resolving these claims because:

> "The absence of an allegation that the personal rights of these parties are affected has the net effect of seeking to raise hypothetical grievances of others who *may be* personally injured by such discrimination. Standing requires at least that the plaintiff himself be personally affected. *Flast*, supra, at 110. See also *United Public Workers v. Mitchell*, 330 U. S. 75 (1947)." (Opinion of the District Court, A. 87)

However, even if plaintiffs were allowed to litigate their claims of equal protection violations, they could not make out a case under the Equal Protection Clause. In their Brief to this Court, Plaintiffs have made certain charges devoid of any factual support in the record against the non-church related schools, under the self-serving heading "The Known Facts with Respect to Racial Discrimination." (Appellants' Brief, p. 49). Speaking for its member schools, PAIS asserts that such "facts" are completely unfair, unjustified and untrue. PAIS would be the first to admit that its members' student bodies are not 50% black and 50% white. However, PAIS categorically denies that its member schools discriminate against black students or that its member schools are segregated. As stated in the Petition of PAIS to intervene as a party in the action before the lower court, all member schools admit all qualified students without regard to race, creed or color (A. 43). It denies that these schools have only admitted a few "token (middle class) black children." (See Appellants' Brief, pp. 48-50 where these charges are made.) PAIS resists and resents plaintiffs' unfounded and unsupported charges that its members have only begrudgingly opened the door

just a crack to admit a mere handful of carefully screened black students. This is just not an issue in the case and we are confident that the Court will totally disregard Appellants' manifestly improper and unfair charges.

Should there ever come a time when the issue of discrimination is properly raised, our member schools are prepared to establish and prove the great progress made in increasing their black enrollment through various recruitment and scholarship programs. Independent schools must charge ever-increasing tuitions to meet the ever increasing costs of providing a quality education to their students. Unfortunately, economic discrimination prevents many black parents from sending their children to the independent schools. But, PAIS member institutions are fighting this harsh fact by offering increasing amounts of scholarship aid to interested black applicants.

Without some state support as provided by the Pennsylvania Act, the independent schools would be hard pressed to continue these essential programs. Instead, independent schools would be forced by economic reality to educate only those children whose parents can meet the costs of independent education. Such a result would not only deprive many black students of an educational alternative to the public school system, but it would also frustrate the goal of independent schools to bring together and to educate a broad spectrum of individuals in the community, and not just those who can afford private schooling.

Because PAIS member schools are fighting to further greater diversity among their student bodies, we cannot and have not allowed Appellants' unfounded charges of discrimination to go unchallenged. Even though Appellants lacked standing to raise any of the asserted Fourteenth Amendment claims, PAIS felt duty bound to present the actual facts to this Court, which belie Appellants' irre-

sponsible charges that the independent schools in Pennsylvania discriminate against blacks. Such an accusation is false, and no amount of discovery or testimony at trial could substantiate that groundless charge.

CONCLUSION.

For the reasons stated in this Brief, the Amicus Brief of the National Association of Independent Schools, and the Brief of the Defendants-Appellees, this Court should affirm, in its entirety, the judgment of the lower court.

Respectfully submitted,

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Pennsylvania Association of
Independent Schools.

DUANE, MORRIS & HECKSCHER,
Of Counsel.

August, 1970.

Appendix.

EXHIBIT A

Message From the President of the United States on Education Reform to the Congress of the United States March 3, 1970.*

* * *

(*f*) *Non-Public Schools.*—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wide range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and sec-

* 91st Congress, 2d Session, House of Representatives, Document No. 91-267.

ondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities.

There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools.

The specific problem of parochial schools is to be a particular assignment of the Commission.

In its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that nonpublic schools in America are closing at the rate of one a day.

(p. 9)

* * *

EXHIBIT B

STATE PROGRAMS FOR ASSISTANCE TO NONPUBLIC SCHOOLS — 1970 [1]

	Purchase of Services		Textbook Aid		Tax Credits		Tuition Grants		Health & Welfare Services		Busing	
	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *
Alaska	X											
Arizona								X				
Calif.								X				
Colorado				X								
Conn.	X		X						X		X	
Delaware											X	
Florida		X		X								X
Hawaii					X							
Illinois		X										
Indiana											X	
Kansas											X	
Louisiana		X	X									
Maine		X		X								
Maryland		X		X							X	
Mass.		X		X								
Michigan	X										X	
Minnesota		X						X			X	
Mississippi			X									
Montana		[2]						X				
Nebraska										X		
N. Hampshire		X	—					X			X	
New Jersey								X			X	
New Mexico			X						X		X	
New York		X		X					X		X	
N. Dakota									X		X	
Ohio [3]		X							X		X	
Penn.	X											
Rhode Island	X		X			X		X				
Vermont							X					
W. Va.		X									X	
Wisconsin								X			X	

* As used in this table, a proposed plan indicates a plan which has been introduced in the legislature or advocated by a responsible governmental authority.

[1] Based on a report by the National Catholic Educational Association, "Survey of Programs and Plans for State Assistance to Nonpublic Schools—Elementary & Secondary as of March 1, 1970."

[2] Proposal for state to hire lay teachers to teach secular courses in nonpublic schools.

[3] Ohio currently has a teacher salary supplement program which provides for the teaching of secular courses.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR AMICUS CURIAE

INTEREST OF THE AMICI

This brief is submitted pursuant to Rule 42(4) of the Rules of the United States Supreme Court on behalf of the Attorney General of the State of Ohio and on behalf of the Cleveland, Ohio Public School District, the Cincinnati, Ohio Public School District, and the Youngstown, Ohio Public School District.

The State of Ohio and the public school districts joined herein are interested in the outcome of the instant case because approximately 360,000 young citizens in Ohio are receiving their secular education in state-accredited nonpublic elementary and secondary schools.

The State of Ohio has demonstrated its interest in the quality of the education of *all of its young citizens* by adopting several statutes providing secular educational assistance to nonpublic as well as public school pupils. Amici are interested in the outcome of the instant case because of its potential impact upon the continued implementation of this Ohio legislation.

Some of the accredited, nonpublic schools in Ohio are administered by private organizations without religious affiliation. Others are administered by, or directly or indirectly affiliated with, the Catholic, Lutheran, Christian Reformed, Seventh-Day Adventist, Jewish, Baptist, Episcopal, or Quaker Churches.

There are 844 accredited, nonpublic schools in the State of Ohio, including 93 in the Cleveland School Dis-

trict, 20 in the Youngstown School District, and 70 in the Cincinnati School District.

The approximately 360,000 nonpublic school pupils in Ohio include 37,478 enrolled in nonpublic schools in the Cleveland School District, 29,171 enrolled in nonpublic schools in the Cincinnati School District, and 11,515 enrolled in nonpublic schools in the Youngstown School District.

There are 30,931 pupils eligible for aid to dependent children in the Cleveland School District, and 29 nonpublic schools located in poverty areas (Title I, ESEA, target areas) in that school district. There are 13,628 pupils eligible for aid to dependent children in the Cincinnati School District, and 15 nonpublic schools located in poverty areas in that school district. There are 2,993 pupils eligible for aid to dependent children in the Youngstown School District, and 10 nonpublic schools located in poverty areas in that district.

In order for its students to qualify for benefits under §3327.01, Ohio Revised Code, a nonpublic school in Ohio may not, in the selection of pupils or teachers, practice discrimination against any person on the grounds of race, color, religion, or national origin.

Legislation adopted by the Ohio General Assembly to enhance the health and secular education of children in accredited, nonpublic schools includes:

Ohio Revised Code §3301.17	Provides driver education training to nonpublic, high school children.
Ohio Revised Code §3319.90	Requires public school districts to provide vocational education training to nonpublic, high school children.

Ohio Revised Code §3317.06(H)	Provides secular educational services and secular educational materials to nonpublic school pupils and partial payment of salaries of lay teachers teaching state required, secular subjects at nonpublic schools.
Ohio Revised Code §3327.01	Provides school bus transportation to children attending accredited, nonpublic schools

In addition to the above, the Ohio General Assembly has demonstrated its interest in the quality secular education of citizens attending institutions of higher education by providing secular instruction grants to college students attending the 45 private colleges in the State of Ohio (Ohio Revised Code §3333.12).

The Ohio legislation most comparable to the Pennsylvania statute being considered in this case is Ohio Revised Code §3317.06(H). The pertinent portion of that statute is attached hereto as "Exhibit A." The health and secular educational services provided under that statute are as follows:

(a) Guidance testing and counseling programs
(b) Programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children
(c) Audio visual aids
(d) Speech and hearing services
(e) Remedial reading programs
(f) Educational television services

(g) Programs for the improvement of the educational and cultural status of disadvantaged pupils

(h) Partial payment of salaries for lay teachers teaching state-required, secular subjects at nonpublic schools

This legislation, like the Pennsylvania legislation, provides safeguards to insure that assistance provided thereunder is limited to secular courses required to be taught in the accredited, nonpublic schools.

Appropriations made by the Ohio General Assembly for implementation of Ohio Revised Code §3317.06(H) during the 1969-70 and 1970-71 fiscal years amounted to $35,774,400.00. Total payments made to the Cleveland School District for implementation of this nonpublic school legislation during the 1969-70 fiscal year amounted to $1,871,399.43. Payments to the Youngstown School District amounted to $573,449.11, and payments to the Cincinnati School District amounted to $1,450,012.00. Approximately the same amounts will be paid to these school districts for implementation of this legislation during the next school year.

This brief is submitted to demonstrate that in adopting the statutes described herein, the legislative bodies in the States of Pennsylvania and Ohio were exercising valid powers of a state to provide secular educational benefits to all of its young citizens.

QUESTIONS PRESENTED AND STATEMENT OF CASE

Amici adopt the Statement of Case and Questions Presented contained in the brief of defendants-appellees.

ARGUMENT

Each State Has a Legitimate Public Interest in the Advancement of the Secular Education of All of Its Children Including Those Attending Schools Administered by Religious Organizations

The Pennsylvania legislation challenged in this case as well as similar legislation adopted in the State of Ohio and other states, was adopted to enhance the secular education of children.

A well-educated child will help meet the future needs of states and the nation regardless of whether he receives his education in a public school or in a state-accredited, nonpublic school.

Article I, §7, of the *Constitution of Ohio* specifically states that knowledge is "essential to good government" and declares it to be the *duty* of the General Assembly to pass laws to "encourage schools and the means of instruction." Judge Leach in his decision in *Honohan v. Holt*, 17 Ohio Misc. 57 (1968), stated:

> ". . . It also is asserted in effect that the Ohio constitutional provisions are 'more restrictive' than the provision of the First Amendment. With this assertion we do not agree. We think it clear that the reference in paragraph 2 of Article I, Section 7 to the encouragement of 'schools and the means of instruction,' immediately following references to religious denominations, *makes it clear that the word 'schools'*

contained in this constitutional provision is not limited to publicly owned and operated schools."

[17 Ohio Misc. 66-67, emphasis added]

Of necessity, there are many essential and beneficial relationships between each state and voluntary organizations in the state fulfilling public functions. As stated by this Court in *Board of Education v. Allen*, 392 U. S. 236 (1968):

"... These cases were a sensible corollary of Pierce v. Society of Sisters: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function. . . ." [392 U. S. 247]

Ohio courts have clearly recognized the proper interest of the State of Ohio in secular education at nonpublic schools. In *Ohio v. Hershberger*, 103 Ohio App. 188 (1955), the court described this legitimate state interest as follows:

"The statutes of Ohio do not require that every child attend public school, but do require that every child, with certain limited exceptions, attend some recognized school, public, private, or parochial. The purpose of the compulsory education law is to require the proper education of every child. *If a child is sent to a private school such school must provide instruction equivalent to the free instruction furnished in the public schools.* The state has an interest in the children residing therein and requires that such children be not denied an opportunity to receive the educational advantages furnished by the public schools."

[103 Ohio App. 191-192, emphasis added]

In *Board of Education of Aberdeen-Huntington Local School District v. State Board of Education*, 116 Ohio App. 515 (1962) (*app. dism.* 174 Ohio St. 321), the court described legislative control over the secular education of pupils in nonpublic schools as follows:

> *"This brief resume can lead to but one conclusion—that the control of schools, be they public or private providing elementary and secondary education for the youth of Ohio, reposes in the Legislature of our state. . . ."*
>
> [22 Ohio Op. 2d 395; emphasis added]

Ohio has a compulsory education law for all children ages six through eighteen. Section 3321.03, Ohio Revised Code, provides in pertinent part as follows:

> "§3321.03, Compulsory school attendance.
> "Except as provided in this section, the parent, guardian or other person having the care of a child of compulsory school age which child has not been determined to be incapable of profiting substantially by further instruction shall cause such child to attend a school *which conforms to the minimum standards prescribed by the state board of education* for the full time the school attended is in session, or shall otherwise cause him to be instructed in accordance *state. . . ."*

Section 3321.07, Ohio Revised Code, requires that nonpublic schools in Ohio conform to minimum standards prescribed by the State Board of Education. The pertinent portion of that statute reads:

> "§3321.07, Requirements for child not attending public schools.
> "If any child attends upon instruction elsewhere than in a public school such instruction *shall be in a school which conforms to the minimum standards*

prescribed by the state board of education. The hours and term of attendance exacted shall be equivalent to the hours and terms of attendance required of children in the public schools of the district. . . ."
[Emphasis added]

Guidance to the Ohio State Board of Education in the matter of formulation of minimum standards for elementary and high schools is provided by §3301.07, Ohio Revised Code, the pertinent portion of which reads:

> "In the formulation and administration of such standards for non-tax supported schools the board shall also consider the particular needs, methods and objectives of said schools, *provided they do not conflict with the provisions of a general education of a high quality* and provided that regular procedures shall be followed for promotion from grade to grade of pupils who have met the educational requirements prescribed."
> [Emphasis added]

Pursuant to the foregoing statutory provisions, the State Board of Education in Ohio has adopted minimum standards regulating such matters in nonpublic schools as philosophy and objectives, organization, administrative policies, records and reports, the education program, teachers, supervisors, principals and administrators, in-service education, instruction, guidance, citizenship, instructional materials, libraries, the school building and grounds, and custodial service. (See *Ohio Elementary School Standards,* 1957, published by State Board of Education.)

In view of the many cooperative relationships that have existed historically between states and church-related social agencies and in view of the advancement of public welfare flowing from such relationships, we fail to see how appellants can expect this Court to con-

demn as "improper entanglement" state regulations which insure high-quality, secular education in nonpublic schools or state regulations which insure that state secular educational assistance is channeled pursuant to legislative intent.

Ohio courts, relying on *Allen* and later *Walz*, have approved regulatory relationships between state and church-related, nonpublic schools when there is no advancement of the religious function of those schools.

The Court of Appeals of Franklin County, Ohio, on July 28, 1970, rendered its decision in a case challenging the constitutionality of a portion of §3317.06(H), Ohio Revised Code. The Court sustained the constitutionality of this legislation and resolved the questions presented to it on the basis of the decisions of this Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Walz v. Tax Commissioner of the City of New York*, 38 L.W. 4347 (1970).

The Court of Appeals recognized the necessity of involvements between state and nonpublic schools to insure high-quality, secular education and properly interpreted the *Walz* case when it held that involvements between state and the nonpublic schools were improper only if the involvement was with the religious or devotional activities of the nonpublic schools. At page 9 of its opinion, the Court which had before it a record of extensive trial testimony stated:

> ". . . From the evidence submitted, and the words of the statute itself it appears that *there is no involvement by the State of Ohio with the non-secular educational or devotional activities* of the various nonpublic schools. . . ." [Emphasis added]

A copy of this recent decision of the Franklin County Court of Appeals is attached to this brief as "Exhibit B."

The United States District Court for the Southern District of Ohio recently had occasion to consider a challenge to the constitutionality of the Federal Elementary and Secondary Education Act of 1965. (20 United States Code, §§82-827) In *Protestants and Other Americans United for Separation of Church and State v. United States of America*, Case No. 3303, the Court sustained a motion for summary judgment and declared this federal legislation to be constitutional and not violative of the Establishment or Free Exercise Clauses of the First Amendment of the *United States Constitution*. At page 8 of its memorandum opinion and order, Judge Weinman found:

> "The primary effect of the Act is to promote a valid secular goal of enhancing the educational opportunities of the nation's youth."

CONCLUSION

The Constitution of the State of Ohio declares and the Ohio General Assembly and Ohio courts have confirmed that knowledge is indeed essential to good government and to an advanced and orderly society. An educated youth is perhaps a state's greatest natural resource. Surely then, a state must have a legitimate public interest in the advancement of secular education of all of its children.

The decision of the three-judge Pennsylvania District Court should be affirmed.

Respectfully submitted,

PAUL W. BROWN,
Attorney General of Ohio

CHARLES S. LOPEMAN,
First Assistant
Attorney General of Ohio

EXHIBIT A

"§3317.06 *Distribution of payments for educational programs and special circumstances; auxiliary services.*

"In addition to the moneys paid to eligible school districts pursuant to section 3317.02 of the Revised Code there shall be distributed monthly, quarterly, or annually as may be determined by the state board of education moneys appropriated for Chapter 3317. of the Revised Code for the following education programs:

* * * *

"(H) An amount to each school district as approved by the state department of education, to provide services and materials to pupils attending nonpublic schools within the school district for: guidance, testing, and counseling programs; programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children; audio visual aids; speech and hearing services; remedial reading programs; educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils, approved pursuant to division (F) of this section; and for programs for the enhancement of instruction in secular courses required to be taught in nonpublic schools by minimum standards adopted by the state board of education pursuant to section 3301.07 of the Revised Code. Such programs of enhancement of secular instruction are to be accomplished by supplementary educational service contracts between the school district and lay teachers who teach one or more such required secular courses, who are employed by nonpublic schools complying with state board of education minimum standards, who, no later than July 1, 1970 hold valid certificates meeting qualifications required for certificates valid for teaching in the public schools issued by the state board of education certifying qualification to instruct pupils in one or more such required secular courses, and who may

written application for such educational service contract salary supplementation. Such contracts shall be entered into on the basis of guidelines adopted by the state department of education. Such guidelines shall provide equitable salary supplementation for lay teachers based upon the percentage of full-time service each such lay teacher devotes to instruction in secular subjects. Such services, instructional materials, or programs provided for pupils attending nonpublic schools shall not exceed in cost or quality such services, instructional materials, and programs as provided for pupils in the public schools of the district. Textbooks and other instructional material used in secular courses by nonpublic teachers receiving salary supplementation from public funds shall be nonsectarian in nature.

To determine whether the services, materials, and programs provided for the benefit of nonpublic school pupils pursuant to this division achieve the purposes of encouraging and enhancing the means of secular instruction and of promoting the continued availability of high quality general education in nonpublic schools, the superintendent of public instruction shall periodically review courses of study, programs of student and teacher evaluation, and pupil achievement tests utilized in nonpublic schools. Each nonpublic school shall establish a satisfactory program of evaluation which measures pupil achievement in required secular courses taught by teachers who are receiving educational service contract salary supplements under this division.

No school district shall provide services, materials, or programs for use in sectarian religious courses or devotional exercises. No educational materials provided shall be used in, especially suitable for use in, or selected for use in sectarian religious courses or devotional exercises.

Educational services, materials, and programs provided for the benefit of nonpublic school pupils under this division shall be provided without distinc-

tion as to the race, color, or creed of such pupils of their teachers. No services, materials, or programs shall be provided for pupils in nonpublic schools unless such services, materials, or programs are available for pupils in the public schools of the school district.

The state department of education shall adopt guidelines and procedures under which such programs and services shall be provided. Nothing in this division shall be construed as entitling nonpublic school teachers who enter into supplementary educational service contracts to participation in the state teachers retirement system provided for in Chapter 3307. of the Revised Code, to the benefits of public school teachers that arise from entry into contracts with school districts pursuant to section 3319.08 of the Revised Code, to workmen's compensation benefits pursuant to Chapter 4123. of the Revised Code, to sick leave benefits pursuant to section 143.29 of the Revised Code, or as causing such nonpublic school teachers to be included in the definition of 'teacher' as defined in division (A) of section 3319.09 of the Revised Code."

EXHIBIT B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 9734

OTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE et al.,

Plaintiffs-Appellants,

v.

ARTIN W. ESSEX, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO et al.,

Defendants-Appellees,

DR. ISRAEL RUBIN et al.,

Intervening-Defendants-Appellees.

DECISION

Rendered on July 28, 1970

MR. PHILIP R. BRADLEY,
1620 East Broad Street,
Columbus, Ohio,
and

MR. WILLARD DOBBS,
40 South Third Street,
Columbus, Ohio,
For Plaintiffs-Appellants.

MR. PAUL W. BROWN, Attorney General,

MR. CHARLES S. LOPEMAN, Chief Counsel,

MR. JAMES THARP, Assistant,
Statehouse Annex,
Columbus, Ohio,
For Defendants-Appellees.

DUNBAR, KIENZLE & MURPHEY,

MR. DAVID J. YOUNG, of Counsel,
50 West Gay Street,
Columbus, Ohio,
For Intervening-Defendants-Appellees.

STERN, J.

This case involves the constitutionality of R.C. 3317.0
(H) (133 Ohio Laws H 535, effective August 18, 1969)

The Franklin County Common Pleas Court held i
effect that the statute under consideration is a valid legs
lative enactment and is not in violation of the Ohio o
the United States Constitutions. The judgment entr
(filed January 23, 1970) is based upon a written decisio
made by the trial judge.

Appellants filed their notice of appeal on questions o
law from the judgment and final order dated January 2
1970.

An appeal on questions of law constitutes a review o
the trial by an appellate court, to determine whethe
prejudicial error intervened in the proceedings or tria
Skeel's Appellate Law, Text 11.27, page 116. R.C. 2505.0
defines an appeal on questions of law as a review of
cause upon legal questions including the weight an
sufficiency of the evidence. Under the provisions of R.C
2503.27, upon an appeal on questions of law the judgmen
of the trial court can only be reversed, vacated or mod
fied for *errors appearing on the record.*

In *Trickey* v. *Trickey* (1952), 158 Ohio St. 914, th
Supreme Court ruled that in an appeal on questions o

law the Court of Appeals cannot substitute its judgment for the judgment of the trial court. See also *In Re Tilton* (1954), 161 Ohio St. 571, syllabus 4.

In order to hold the statute under consideration offensive to the state or federal constitutions this court must determine that the invalidity of the law is upon its face apparent, or that there is no evidence to support the trial court's judgment.

Appellants contend that the services, materials, and programs made available by the State of Ohio to nonpublic school pupils under the authority of R.C. 3317.06 (4) is a violation of the First Amendment to the federal constitution, and Article VI, Section 2 of the Ohio Constitution which constitutional provisions in effect prohibit state aid being directly given to parochial schools.

The parties to this cause prior to trial entered into a written stipulation of facts which provided in part:

"2. The State of Ohio has appropriated $15-million for the purpose of implementing R.C. 3317.06(H) (the portion of Amended Substitute Senate Bill 350 challenged herein). To date, $13,754,147.51 of said total appropriation has been expended to provide the following services, materials, and programs pursuant to this Act:

a. Guidance testing and counseling programs.
b. Programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children.
c. Audiovisual aids.
d. Speech and hearing services.
e. Remedial reading programs.
f. Educational television services.
g. Programs for the improvement of the educational and cultural status of disadvantaged pupils.

h. Other programs of nonreligious instructi which do not constitute basic classroom i struction.

"* * *

"6. The nonpublic schools referred to in R.C. 3317.0 (H) include state-accredited schools which a either church-related schools, schools whic teach religion, or schools without religious affil ation. The church-related schools or schools which teach religion include Jewish, Catholic Lutheran, and Christian Schools. All of thes schools are state-accredited and comply wit minimum educational standards adopted by th State Board of Education pursuant to Ohio law These schools provide state-accredited instruc tion in all secular courses required to be taugh in public schools. The state minimum educationa standards with which these schools comply re quire adherence to standards regulating teache qualification, number of teachers, maintenanc of records, minimum length of school day, mini mum length of school term, secular course con tent, and required curricula.

"* * *

"8. None of the services, materials, or programs pro vided by local public school districts pursuant t R.C. 3317.06(H) have been provided for use i religious instruction or devotional exercises, and none of said services, materials, or programs pro vided thereunder are used in, especially suitable for use in, or were selected for use in religious in struction or devotional exercises."

The trial court took extensive testimony offered by the parties.

In its written decision the court made certain findings of fact and conclusions of law from the evidence and stipulation:

"* * * that plaintiffs have not shown that the services, materials and programs made available to non-public schools under the Act contributed to the teaching of religion. They have not shown that the Act (sic 3317.06(H) R.C.) results in unconstitutional involvement of the state with religious instruction. They have not shown that the Act is a law respecting the establishment of religion within the meaning of the First Amendment to the Constitution of the United States. We hold that Section 3317.06 H R.C. is not in violation of the United States Constitution."

The issue presented therefore for review is whether e trial court erred as a matter of law in coming to the nclusion which it reached.

Counsel for all parties have carefully and thoroughly viewed all applicable decisions pertinent to the issue. Upon a review of the various citations upon which th sides rely, it appears that the question presented as to be resolved on the two most recent decisions anded down by the Supreme Court of the United States. hey are *Board of Education* v. *Allen* (1968), 392 U.S. 36, 88 S.Ct. 1923; and *Walz* v. *Tax Commissioner of the ity of New York* (1970), 38 L.W. 4347.

Allen held in effect that a state may not support or ssist religious functions in a non-public school that is dministered by a religious organization or when such chools teach religious courses and conducts religious xercises. Public funds may be expended to provide legitmate assistance to pupils when it is intended that such ssistance is to enhance the secular instruction of pupils t non-public schools.

In *Walz*, as in all previous cases, the Supreme Court eviewed the previously decided cases wherein the issue

of the Establishment Clause was considered in detail. T
rationale of Chief Justice Burger's opinion is:

> "The course of constitutional neutrality in this ar
> (sic The Establishment and Free Exercise Claus
> of the First Amendment) cannot be an absolute
> straight line; rigidity could well defeat the bas
> purpose of these provisions, which is to insure th
> no religion be sponsored or favored, none com
> manded, and none inhibited. The general princip
> deducible from the First Amendment and all th
> has been said by the Court is this: that we will n
> tolerate either governmentally established religi
> or governmental interference with religion. * * *
> "Each value judgment under the Religion Claus
> must therefore turn on whether particular acts i
> question are intended to establish or interfere wi
> religious beliefs and practices or have the effect
> doing so. Adherence to the policy of neutrality th
> derives from an accommodation of the Establis
> ment and Free Exercise Clauses has prevented th
> kind of involvement that would tip the balance t
> ward government control of churches or governme
> tal restraint on religious practice.
> "Adherents of particular faiths and individu
> churches frequently take strong positions on publ
> issues including, as this case reveals in the sever
> briefs *amici*, vigorous advocacy of legal or constit
> tional positions. Of course, churches as much as sec
> lar bodies and private citizens have that right. Y
> perfect or absolute separation is really possible; th
> very existence of the Religion Clause is an involv
> ment of sorts—one which seeks to mark boundari
> to avoid excessive entanglement."

Professor Freund, in "Public Aid to Parochi
Schools," 82 Harvard Law Review 1680, said that the
are three policies behind the First Amendment religio

guarantees: i.e., voluntarism, mutual abstention and governmental neutrality. The evidence submitted to the trial court by stipulation and by oral testimony does not indicate that as a matter of law these basic guaranties were violated by the services offered by the state to non-public schools, under the authority of the specific statute under consideration. In none of the recent cases decided by the courts has it been declared that any service or benefit offered by a state to a church-related school is in itself a violation of the First Amendment. The test is whether there is in fact a direct involvement by the state with the church, or by the church with the state which interferes with the free exercise of the respective functions of church and state. The legislature in enacting R.C. 3317.06(H) set forth certain guidelines such as enhancement of instruction in secular courses required to be taught in non-public schools, services to be of benefit to such pupils, prohibiting the use of the services, and materials, etc. for religious courses or devotional exercises etc. recognized the importance of providing such specific services and facilities to all school children, be they public or non-public. Such certain services, materials etc. are to be provided equally to pupils attending all private and public schools that are state-accredited.

In the light of the stipulations and evidence submitted to the trial court, there was sufficient evidence submitted to support the court's conclusion that R.C. 3317.06(H) is a valid legislative enactment, and does not offend the state or federal constitutions. From the evidence submitted, and the words of the statute itself it appears that there is no involvement by the state of Ohio with the non-secular educational or devotional activities of the various non-public schools who have availed themselves

of the services offered by the state to such church related schools. As a matter of law this court cannot substitute its judgment for the trial court's finding.

Appeal dismissed. The judgment of the Common Pleas Court is affirmed.

TROOP, P. J., and HOLMES, J., concur.

FILE COPY

Supreme Court, U.S.
FILED
AUG 10 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 89.

ALTON J. LEMON, ET AL.,
Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, ET AL.,
Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF OF THE SCHOOL DISTRICT OF PHILADELPHIA, *AMICUS CURIAE.*

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BRIEF OF THE SCHOOL DISTRICT OF PHILADELPHIA, *AMICUS CURIAE*.

INTEREST OF THE *AMICUS*.

The School District of Philadelphia is charged with educating over 290,000 children in the City's public elementary, junior high, senior high, and technical high schools. Like the parents of these children, the School District wants its students to receive the best possible preparation for adult life.

For many big-city public school systems, however, including Philadelphia's, this goal appears to be receding out of reach. Traditional educational techniques have not proven successful in the classrooms of inner-city schools. Students are often hostile or bored, falling further behind with each year of instruction. And the sense of failure which inner-city students experience in school often extends into their adult lives.

Yet the new teaching techniques and instructional materials which must be developed, perfected, and implemented on a large scale before existing conditions can be improved will not materialize without huge expenditures of funds. Referring to the current lack of such funds, renowned educational innovator, Dr. Mark R. Shedd, Philadelphia's Superintendent of Schools, has written:

> In Philadelphia, the Board of Education, the School District staff, and the community unmistakably are committed to quality education and reform. But even the most deeprooted enthusiasm and optimism can be stifled if devoted people committed to change constantly must look over their shoulder at the specter of bankruptcy.[1]

1. Proposed Operating Budget of the School District of Philadelphia, Fiscal Year Beginning July 1, 1970, p. 2.

The School District of Philadelphia shares its educational and related financial problems with the City's nonpublic schools, especially the Archdiocese of Philadelphia, which provides secular as well as sectarian education for over 144,000 Philadelphia elementary and high school children. Because their common problems are now so critical, both organizations have recognized the necessity of working together to solve them. Essentially, while the students in each system can benefit from successful innovations developed by the other, each system may face an influx of students and new problems without any assistance if the other cannot provide the quality secular education Philadelphia parents rightfully expect.

Thus, it is in the interest of the School District of Philadelphia and Philadelphia public school children to see that the parochial school system provides the most effective secular education possible for its students. Accordingly, we support the purchase of educational services from nonpublic schools as promoting that end, and submit this brief *amicus curiae*.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED.

This brief is addressed to the single question whether Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, violates the Establishment Clause of the First Amendment as it is applied to parochial schools.

ARGUMENT.

1. The Purpose and Primary Effect of Act 109 Is to Improve the Education of All Philadelphia School Children.

In its opinion below, the three-judge court examined Act 109 in conjunction with the standard established in *Abington School District v. Schempp*, 374 U. S. 203 (1963) and followed recently in *Board of Education v. Allen*, 392 U. S. 236 (1968) for determining whether alleged public welfare legislation breaches the wall of separation between church and state. The test, as announced in *Schempp*, is:

> [W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (374 U. S. at 222)[2]

Permeating this test is a concept of governmental neutrality, which prevents government from directly sponsoring a religious institution, but also prevents it from denying basic services to individuals simply because a religious institution may incidentally be benefited. The two classic applications of this principle, in *Everson v. Board of Education*, 330 U. S. 1 (1947), and *Board of Education v. Allen*, *supra*, upheld state grants to parents for bus transportation

2. Very recently, in *Walz v. Tax Commission*, 397 U. S. 664 (1970), this Court restated this test as a question "whether particular acts . . . are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669.

to and from parochial schools and state loans of textbooks to parochial school students. In each case this Court acknowledged that some benefit would accrue to the religious institution,[3] but determined that the thrust of the legislation was to provide a much needed public service to children *regardless* of their religious affiliation. Similarly, the Court has repeatedly stated that government may constitutionally provide sectarian institutions with police, fire, and other such protection. *Everson v. Board of Education, supra,* at 17; *Walz v. Tax Commission,* 397 U. S. 664, 671 (1970).

In upholding tax exemptions for church property, the Court noted in *Walz* that constitutional neutrality is not a rigid concept. The Court cautioned that

> "[R]igidity could well defeat the basic purpose of [the Establishment and Free Exercise Clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established or governmental interference with religion. Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. (397 U. S. at 669)

While noting that risks inhere in any program requiring administrative relationships between church and state, the Court concluded that it is possible to chart a course which

3. The Court in *Walz v. Tax Commission,* 397 U. S. 671, saw through the contention, now raised by Plaintiffs, that students attending parochial schools, not the schools themselves, were benefited by the lending of textbooks in *Allen.*

appropriately preserves religious freedom and encourages religious instruction in the best of our traditions, but does not establish religion. 397 U. S. at 672.

In the instant case, there are certain landmarks which can guide the Court as it pursues that course. Act 109 permits the state to purchase secular educational services from nonpublic schools in the subjects of mathematics, modern foreign languages, physical sciences, and physical education. The nonpublic schools must in return use books approved by the state, achieve a prescribed level of pupil performance, and, after five years, employ only teachers certified by the state to teach these secular subjects. Appellants claim that these provisions amount to no more than subsidy of a religious enterprise, although they fail to demonstrate how in substance reimbursing an institution for specific materials and services after they have been provided is any more of a subsidy than providing books directly as in *Allen*. In fact, the quality controls built into Act 109 are a signal that the legislation was designed to promote educational excellence for Philadelphia private and parochial school children. An additional signal, marking the purpose and effect of the legislation, is that the benefits of improved education, as promoted by Act 109, will extend indirectly to Philadelphia's public school children as well.

Clearly, the Pennsylvania legislature understood the nature of these indirect benefits. Section 2 of Act 109, declaring legislative findings, states that educational excellence has become increasingly important to national and individual well-being, that such excellence has become an increasingly costly burden on the Commonwealth in relation to other basic services that must be provided, and that nonpublic schools assume a sizeable portion of this potential burden. The legislature concludes:

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

The economics of public education in Philadelphia unquestionably bear out this finding. The School District of Philadelphia is having difficulty providing adequate facilities and instruction for the students it currently serves. According to Dr. Shedd,

> "Total enrollment (including pre-school) still exceeds the total optimum capacity of existing permanent facilities by almost 30 percent. Half of the elementary and 70 percent of the secondary schools in Philadelphia are overcrowded now . . . ."[4]

In some junior and senior high schools, dual shifts have been instituted because of the severe overcrowding. In the District's proposed operating budget for 1970-71, labelled by the Superintendent of Schools a "budget of frustration," important teaching positions and services have been cut from the junior and senior high school programs, as well as from adult and special education, in order to meet even more critical needs of early childhood and elementary education. In addition, important com-

4. Introduction, The School District of Philadelphia Proposed Capital Budget and Program—1971-1976, page iv.

munity and individual student services, such as opening schools at night and counselling, have been reduced. Given the already poor performance of Philadelphia school children on nationally standardized tests, these reductions can hardly be afforded. As the Superintendent describes the budget,

> It's not a pretty picture. The process of constant budget cutting is debilitating, demoralizing, and destructive. Promising programs are lost.[5]

But incredibly, despite all the paring, the School District's proposed budgeted expenses still exceed known receipts by over $29.8 million.[6]

Educationally and financially sound nonpublic school systems are able to cooperate with the School District to improve education for everyone, through sharing of new ideas, facilities, instructional materials, and services. For example, the School District has recently constructed an elementary school beside an existing parochial school, creating opportunities for shared instructional programming and for shared playground, gymnasium, and other facilities.[7] At the same time, sound nonpublic school systems provide competition for the public schools, from which educational innovations come, both systems benefit, and progress results.[8]

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5. Proposed Operating Budget of the School District of Philadelphia, Fiscal Year Beginning July 1, 1970, pp. 2-3.

6. *Id.* at 45.

7. Testimony presented to the House Committee on Basic Education of the Pennsylvania Legislature by David A. Horowitz, Deputy Superintendent of Instruction of the School District of Philadelphia, April 3, 1968.

8. The President's Message to Congress Proposing a Series of Actions to Improve Elementary and Secondary Education, March 3, 1970, in Weekly Compilation of Presidential Documents, Monday, March 9, 1970, Volume 6, number 10 at 312.

But conversely, nonpublic schools which fail to provide the high quality secular education parents expect can have a debilitating, even paralyzing, influence on the public school system. Given the importance of secular education today to a child's future success,[9] many parents are unlikely to tolerate grossly inferior secular education in the parochial schools simply to obtain sectarian education as well. And parents of private school students are likely to defect even more rapidly from inferior schools. The inevitable result will be an influx of nonpublic school students into the public school system.

The School District, however, does not have unused excess capacity with which to absorb these potential transferees. Its capacity is exceeded even now. And the additional operating expense for each nonpublic school student, using proposed per pupil expenditures for 1970-71, would be $799 in elementary school, $899 in junior high school, and $1,059 in senior and technical high school. These costs include both direct instructional costs and allocated overhead costs but exclude debt service as well as other semi-variable costs.[10]

At these rates, if the over 148,000 pupils now enrolled in Philadelphia nonpublic schools, including over 144,000 parochial school students, transferred to the public schools,

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9. In *Brown v. Board of Education*, 347 U. S. 483 (1954) the Court established that

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. (*Id.* at 493)

10. These figures are derived from the Proposed Operating Budget of the School District of Philadelphia, Fiscal Year Beginning July 1, 1970.

the total cost to the public would be almost $129 million, including plant operations and maintenance costs but excluding costs applicable to the acquisition, lease, or construction of school buildings. Certainly the huge capital investment necessary to provide new facilities could be sharply reduced if the nonpublic schools permitted the School District to take over their existing facilities. However, the additional capital cost burden to the public would still be substantial. If the School District staff is demoralized and nearly incapacitated by present financial conditions, it would be overwhelmed by an influx of nonpublic school students into the public school system.

Thus, Pennsylvania is preserving definite educational advantages for all Philadelphia school children and preventing catastrophe for all by promoting excellence in secular education in the private and parochial schools through Act 109. At the same time, it is saving the public considerable amounts of money which can be spent on other pressing needs, since the cost of purchasing educational services from nonpublic schools is much less than the cost of absorbing nonpublic school students into the public school system. During the school year 1970-71, Philadelphia parochial schools will receive only $4.3 million for the purchase of educational services; private schools will receive $1.3 million. In a recent message to Congress, President Nixon noted the importance of parochial schools in promoting educational diversity, and stated that nationwide, the cost to the public if all nonpublic schools closed would exceed $4 billion per year for operations by the end of the 1970's, with an estimated $5 billion more needed for facilities.[11]

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11. The President's Message to Congress Proposing a Series of Actions To Improve Elementary and Secondary Education, *supra*, at 312.

Plaintiffs have characterized these educational and financial considerations as "*in terrorem*", and "not . . . a justification for an otherwise constitutional [sic] enactment." But at least one court has distinguished the purpose and effect of Pennsylvania's Act 109 from the purpose and effect of a statute which does fit those descriptions. In *Opinion of the Justices,* 261 A. 2d 58 (1970), a plurality of judges on the Maine Supreme Court stated in an advisory opinion that "the financial benefit to the non-public schools was inferential" in Act 109; while in the proposed Maine statute, based on explicit legislative findings that the parochial schools were on the brink of closing, aid is "expressly and directly solicited." On this basis, and on the ground that Act 109 was limited to specific nonvalue-oriented secular subjects while the Maine bill was not, the Maine court found that the decision of the three-judge court in this case was neither apposite in fact nor decisive in law. And in his concurring opinion in *Walz,* Justice Brennan stated that a legitimate basis for granting tax-exempt status to church property is that religious organizations "contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community." 397 U. S. at 687.

The *Schempp, Allen,* and *Walz* tests do not prohibit incidental financial benefit to a sectarian institution, so long as there is a primary purpose and effect which serves the public welfare. The Pennsylvania legislature, in attempting to preserve constructive cooperation and competition between public and nonpublic schools through Act 109, primarily provided benefits for every school child in Philadelphia, and served the public well.

2. Act 109 Does Not Cause Government to Interfere Unconstitutionally With Religion.

While Plaintiffs apparently accept the *Schempp-Allen* test as the basis for determining whether Act 109 offends the Estatblishment Clause, they contend that the constitutionality of Act 109 further depends on whether the act creates an interdependence between church and state. However, in *Walz,* this Court considered the tests of "interdependence" and "entanglement" interchangeable with language in the *Schempp* test stating that legislation is unconstitutional if it *aids or inhibits* religion. 397 U. S. at 672-74.

Whatever the wording, "the test is inescapably one of degree." *Walz v. Tax Commisssion,* 397 U. S. at 674. Thus, one convenient point of departure is whether Act 109 inhibits or interferes with religion to a significantly greater extent than the statutes involved in *Everson* and *Allen.* Chief Judge Hastie contends in his dissenting opinion below that such a difference exists; but he does not elaborate. In fact, he refers to *Allen* only to demonstrate similarities between the dangers of state involvement in the curriculum of parochial schools in the two cases (Appendix to Brief for Appellants at A107). Plaintiffs argue in their brief that the bus transportation provided in *Everson* was "finite in quantity," while the nature of a cash subsidy, presumably as provided in Act 109, is "limited in amount only by the political power of religious groups" (Brief for Appellants at 27). This contention indicates that Plaintiffs have misperceived Act 109. The state funds paid to parochial schools through Act 109 are not a vague subsidy; they are paid to parochial schools for performing very particular educational services. Unless these schools expand their instruction in the subjects for which educational services are purchased, they cannot receive additional

funds under Act 109. To obtain more money without expanding instruction in the four specified subjects, parochial schools would have to lobby for qualitatively different, though related legislation, such as legislation providing for purchase of services in reading instruction. But Act 109 gives parochial schools no more incentive to seek other legislation than the statute in *Allen* gives them to seek legislation providing desks, chairs, and notebooks to parochial school students on request. In either case, there is no inevitable progression from one piece of legislation to another.

Plaintiffs contend further, however, that the fact that the state may purchase only educational services which are secular in nature creates unwarranted state supervision over sectarian affairs. This contention is subject to two criticisms.

First, Plaintiffs are contradicting themselves. They seem to acknowledge that the state could make demands of parochial schools identical to those in Act 109 (approved textbooks, certified teachers, standardized test performance) apart from the purchase of educational services, as part of its compulsory education requirements (Brief for Appellants at 35; Brief of American Association of School Administrators et al., *Amici Curiae* at 12). Yet they also argue that these same demands cause church and state to become unconstitutionally entangled.

Second, experience has not borne out Plaintiffs' contention that undue entanglement will occur. In determining the constitutionality of tax exemption for church property in *Walz,* this Court carefully inquired into the amount of church-state involvement generated over the long history of that practice, and found little. Although church-state relationships such as those established in Act 109 have not long pervailed, what experience the School District of

Philadelphia has had with similar relationships indicates that they need not constrain the sectarian partner. Under the Elementary and Secondary Education Act of 1965, 20 U. S. C. §§ 241a-m, federal funds are allocated to local education agencies, which must be public, to provide special educational services for children of low-income families who go to public or parochial schools in the areas serviced by the agencies. Control of all funds as well as of teachers and instructional materials paid for with the funds rests in the public agency. 20 U. S. C. § 241e(a)(3); 45 CFR § 116.19. These special services are to be designed to meet the needs of all school children in the relevant district, regardless of whether they attend public or parochial schools.

The opportunities for rivalry, currying favor, and lobbying to increase the grant formula can be imagined, but only imagined. In Philadelphia, there has been harmony and mutual consideration in the planning process carried on between the School District and the Archdiocese Board of Education, but also independence of needs and thought. In his testimony before the House Committee on Basic Education of the Pennsylvania Legislature on April 3, 1968, David A. Horowitz, Deputy Superintendent of Instruction of the School District of Philadelphia, gave two illustrations of this process. As a result of meetings between the two school systems, federal funds were budgeted to meet priority needs of the parochial school system in speech therapy and remedial reading which did not coincide with those of the public schools. The School District also loaned instructional materials, musical instruments, and teaching machines to parochial schools to meet their particular needs.

Plaintiffs' contention that Act 109 invites unnecessary entanglement between the state and parochial schools survives neither logic nor experience. As Chief Judge Hastie

admitted in his dissent below, "[R]eligion's interest and the state's interest in the public good necessarily overlap" (Appendix to Brief for Appellants at A103). In such areas of overlap, there are inevitably administrative relationships between church and state. But Act 109 does not extend these relationships beyond permissible bounds. It is properly concerned with the quality of secular education in nonpublic schools, and injects that concern only into subjects which allow minimal intermingling of the secular and the religious.

CONCLUSION.

Whether the inquiry is into its primary purpose or effect or into the church-state interdependence it may cause, Act 109 stands as a proper attempt to improve the secular education of public and nonpublic school children alike. From experience, we know that the potential benefits to the children of Philadelphia are great, the hazards avoided are great, and the risks relatively small. We believe Act 109 is constitutional on its face and as applied, and that the decision of the three-judge court below should accordingly be affirmed.

Respectfully submitted,

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August, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL.,

Appellants,

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Appellees.

BRIEF FOR AMICUS CURIAE CITIZENS FOR EDUCATIONAL FREEDOM

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INTEREST OF THE AMICUS

The organization of Citizens for Educational Freedom (CEF) was conceived and has labored to speak for the principal, but for the most part unrepresented, party in the educational aid debate which has been the focus of national attention for the past decades. It is the cause of parents and school children, not schools as such. CEF is dedicated to excellence, equality, and freedom in education for every American child, regardless of race, creed, color or school attendance. CEF is a national, non-sectarian, non-partisan, and non-profit civic organization.

CEF deems it fundamental that in education at *every* level the rights of freedom in learning, speech and of communication of thought, conscientious conviction and philosophic orientation be recognized as paramount. Basic to such contention is the belief that unless there exists a *viable* alternative to state-operated public schools reasonably available to every child, educational freedom and diversity cannot be said to exist, educational equality must remain but a phrase, and educational excellence be made difficult if not impossible of attainment for all but the well-to-do. Citizens for Educational Freedom supported the passage of The Pennsylvania Nonpublic Elementary and Secondary Education Act (No. 109 of 1968) as an implementation of its view that unless nonpublic schools can continue in being, First Amendment freedoms in education will very soon exist only as historical memories.

This brief is filed with the written consent of all of the parties, and in support of the decision below which held that Act 109 is valid and not in violation of any provisions of the Constitution of the United States.

ARGUMENT

I

PENNSYLVANIA ACT 109 IS CONSTITUTIONAL IN ALL ASPECTS

The Pennsylvania law for the purchase of secular educational services makes possible the continued exercise of the freedoms protected under the First Amendment and does not violate the establishment prohibition of that Amendment. The Act encourages the pursuit of education and assists parents to comply with the Pennsylvania compulsory education law while, at the same time, making it a continued possibility for parents to exercise their right to send their children to a non-public school of their free choice. It is clear that the State has a proper interest in furthering the

secular education of all its resident children and that so long as it does not involve itself in any religious exercise and subjects, it can provide secular educational services for those children in a variety of ways. The conclusion is supported not only by the precedents of this Court as reviewed and elaborated in *Board of Education v. Allen*, 392 U.S. 236 (1968) but by the many Federal and state legislative judgments expressed in a host of educational aid programs covering non-public education since 1945. The federal constitution does not prohibit state support of secular educational services in non-public schools.

The Pennsylvania Act cannot be seen, other than in the context of the unquestioned economic crisis facing non-public as well as public education. That economic crisis, which is nation-wide, foredooms non-public education in Pennsylvania and elsewhere unless some step such as the Pennsylvania Act is accomplished and upheld. Further, with the death of non-public education—now a growing reality in many areas of the Country (See message of President Nixon to Congress on Educational Reform, March 3, 1970; Weekly Compilation of Presidential Documents, V. 6, No. 10, pp. 304, at p. 312)—there will also be all of those freedoms, together with the products of those freedoms, which are so precious and essential to an open American society, and also to the well being of the public schools. The Pennsylvania Act has a sound secular educational and social objective. Viewed in that context, no practical alternative to such an aid proposal exists except to promote a total monopoly of all education in the state, with the evils which that portends.

II

FREEDOM OF CHOICE IN EDUCATION WHICH IS THE KEYSTONE OF A FREE ACADEMIC COMMUNITY, THE BULWARK AGAINST A MONOLITHIC STATE EDUCATIONAL SYSTEM AND THE SOLE MEANS BY WHICH PARENTS CAN TRULY EXERCISE EDUCATIONAL AND RELIGIOUS CONVICTIONS FUNDAMENTAL TO AN OPEN SOCIETY, MERITS CONSTITUTIONAL PROTECTION, NOT CONSTITUTIONAL DESTRUCTION

It is standard for opponents of any form of education assistance to children in non-public schools to predict th possibility of such aid precipitating the dissolution of on country's public schools. Apparently this argument is base upon a conviction that if the student clientele of publ schools were truly free to exercise their real education choice they would leave the public schools in droves. Suc a consequence surely must be characterized as extremel speculative at best. Based upon this unlikely prospect, th conclusion nevertheless is advanced that it is essential to th survival of public schools to oppose such assistance to no public education of whatever nature even if the result is t extinguish non-public education altogether.

In opposition to the surely questionable speculations o the undoing of public education by programs making free dom of choice in education practical, there exists today i Pennsylvania and throughout America, the reality that no public education is in fact being reduced at a disastrous rat of attrition because educational freedom cannot econom ically be exercised. The fact is that unless aid of the so adopted by Pennsylvania in Act 109 is legislated and up held, non-public education in America will soon cease t exist in any meaningful sense.

Thus, there is posed for this Court a much larger issu than the extremely important one placed before it on th face of this case. The fundamental issue at stake is whethe in fact there is to remain in the United States any alterna tive whatsoever to state operated public schools.

In this regard, many persons equate parental choice of a non-public school for their children with some sort of legal license or privilege. They argue that if parents want to participate in public benefits, then let them surrender their constitutionally protected choice of a non-public school; otherwise, they must expect to suffer the penalty of denial of any meaningful public welfare benefits in education.

The Supreme Court long ago established that freedom to choose a non-public school was not a mere permissive state license when it held unconstitutional the Oregon law requiring all children to attend state public schools only:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nuture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (*Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925))[1]

The connection between the exercise of parental rights and fundamental freedom is indisputable.[2] To disable a

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[1]The *Pierce* decision was universally hailed upon its issuance as an "end to the effort to regiment the mental life of Americans through public school instruction." The Court," . . . stifled the recrudescence of intolerance." *New Republic*, Felix Frankfurter, June 17, 1925. The New York *Times* compared the Oregon law to those in effect in Russia and Turkey requiring attendance at state schools. April 2, 1924. One historian felt the case significant as preceding by constitutional denial the developments later to come into being in Nazi Germany. Stokes, *Church and State in the United States*, Vol. II, p. 741.

[2]"To say that education regards the family is to take no notice of the present realities. Only the state can educate them." Fascist Party statement, II *Messaggero*, Rome, July 14 and 26, 1929. "When an opponent declares, 'I will not come over to your side,' I (Adolph Hitler) calmly say, 'Your child belongs to us already . . . What are you? You will pass on. Your descendants, however, now stand in the new camp. In a short time they will know nothing else but this

state, on constitutional grounds, to encourage such freedoms would be to undermine the very principle in *Pierce*. It would be to encourage the very result sought by the State of Oregon in *Pierce*.[3]

How much of what was to become the tragic history of the world under totalitarianism, (the philosophy implicit in the argument of the Oregon counsel in *Pierce*), was foreseen in the important decision of *Meyer v. Nebraska*, 262 U.S. 390 (1923) which nullified a law barring the use of languages other than English in private schools:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such

---

new community.' " *The Rise and Fall of the Third Reich*, Shirer, Simon and Shuster, page 249.

"This new Reich will give its youth to no one, but will itself take youth and give youth its own education and its own upbringing." Statement of Adolph Hitler, May 1, 1937, page 249, *ibid.*

[3]It is of interest to note in this respect that educators generally are in accord that the removal of religion from the educational process *cannot* be accomplished in any school, public or non-public. See, for example, *The Scholars Look at the Schools*, National Education Association, Washington, D. C.: Association for Supervision and Curriculum Development, N.E.A., 1962, p. 18, where the author stated:

> "There is no teacher, no school, which can escape the problem of life orientation, the ultimate commitments by which every person must live. Every analysis of life and culture must take account, either implicitly or explicitly, of those fundamental commitments which underlie every human action. This is precisely the domain of religion. Democracy, communism, and the various economic systems cannot be analyzed in their most profound dimensions without getting into the question of ultimate values. This is, finally, a religious question."

restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." *Id.* at 402.

The case of *Farrington v. Tokushige*, 273 U.S. 284 (1927) struck down a Hawaiian law placing foreign language schools under unreasonable state restrictions. In *Farrington*, the Court held that the law effectively destroyed such schools and thereby "unconstitutionally deprives parents of the right to direct the education of their children." (Syllabus 4). Thus the nexus between parental freedom, and the viability of the school was clearly established.

More recently, the Supreme Court expressed its reluctance "to permit a single, ironclad system of education to be imposed upon a nation composed of so many strains, stating, we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools." Minersville School Dist. v. Gobitis, 310 U.S. 586, 599 (1940).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court showed particular sensitivity to avoid unnecessary restrictions upon cherished fundamental liberties:

> "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice - whether public or private or parochial - is also not mentioned. Nor is the right to study any particular subject or foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> By *Pierce vs. Society of Sisters*, supra, the right to educate one's children as one chooses is made applicable to the States by force of the First and Fourteenth Amendments. By *Meyer vs. Nebraska*, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of

> available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin vs. Struthers*, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman vs. Updegraff*, 343 U.S. 183, 195) - indeed the freedom of the entire university community. *Sweezy vs. New Hampshire*, 354 U.S. 234, 249-50, 261-63; *Barenblatt vs. United States*, 360 U.S. 109, 113; *Baggett v. Bullitt*, 377 U.S. 360, 369; *Without those peripheral* rights the specific rights would be less secure. And so we affirmed the principle of the *Pierce* and the *Meyer* cases." *Id.* at 482-83.

There can be few liberties of greater importance in the hierarchy of freedoms. The right of free choice in education is an international standard by which a nation's respect for liberty is measured. See *United Nations Declaration on Human Rights*, Article 16 (3) and Article 26 (3) to that effect. And *United Nations Declaration on the Rights of the Child*, November 20, 1959. See *Protocol* to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, March 20, 1952) which states in part, "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." (United Nations Treaty Series, 1955, p. 262.).

These considerations were given eloquent voice by Justice Brennan concurring in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) *Id.* at 242:

> "The choice between these very different forms of education is one–very much like the choice of whether or not to worship–which our Constitution leaves to the individual parent. *It is no proper function of the state or local government to influence or restrict that election. The lesson of history–drawn more from the experiences of other countries than from our own–is that a system of free public education forfeits its unique contribution to the growth*

of democratic citizenship when that choice ceases to be freely available to each parent." (emphasis added)

From the foregoing discussion and based upon the precedents referred to, we believe certain conclusions are inescapable:

The Constitutional right of the parent to select the school for the education of his children should also enjoy a high priority in social policy and law. Parental freedom in education insures a free academic community and is a guarantee against the imposition of a monolithic state operated system of education which, without diversity of other systems, can become both pedagogically and politically deadening.

The state may, therefore, consistent with the best traditions of permitting freedom and voluntarism, assist parents to educate their children in the school of their choice by assisting the secular educational functions of those schools. This would promote, not undermine, government neutrality in education or religion, because, in the mass welfare state, where the inability of parents to support private education is substantially brought about by massive government taxation and spending of private tax contributions, the denial of such aid, in law as well as in policy, would cast the government in a dispensing role, not of fair neutrality, but of hostility toward individual choice of non-public education.

III

THE DECISION BELOW SHOULD BE AFFIRMED

A. *The Constitutional Test under the Religion Clauses of the First Amendment:* CEF contends that the opinion of the Court below, both in its reasoning, and in its analysis of principles laid down by the Supreme Court of the United States is sound, on both the issues of standing to sue, and the issues on the meaning and application of the Religion Clauses of the First Amendment. By its very terms, Act 109 is manifestly designed to carry forward a secular legis-

lative purpose and to assure a primary secular educational effect that neither advances or inhibits religion. In no way does it coerce any citizen in the practice of his religion. Act 109 thus falls squarely within the rationale of *Board of Education v. Allen*, 392 U.S. 236 (1968) as recently cited approvingly in *Walz v. Tax Commission*, 397 U.S. 664, at 672, (1970).

B. *Issues of Standing to Sue:* The interest of CEF on these issues indirectly bears upon the merits of persistent attacks upon educational aid legislation by groups which are ideologically opposed to any practical enablement of free choice in education. Such groups or persons assert essentially policy or legislative objections to Act 109, and the legislature is the proper forum for seeking to prevent or repeal statutes which they oppose on ideological grounds. If they lack any personal stake in the statutory operation, they should not be permitted to press their attacks in a judicial forum, and seek to have the court act as a court of revision of legislative policy.

For the reasons stated in the precedents of the Supreme Court of the United States, as cogently outlined in the opinion of the court below, CEF contends that, of all the plaintiffs in this case, only the plaintiff, Lemon, alleged any basis for standing to sue, and then only to raise the issue whether Act 109 violated the Establishment Clause.

CONCLUSION

It is respectfully submitted that, in the interest of a true and practical neutrality toward freedom of choice and of academic freedom of parents and school children and in line with the governing constitutional principles and precedents of this court, Pennsylvania Act 109 is valid on its face: the

judgment of the Three Judge District Court below, therefore, should be affirmed.

Respectfully Submitted,

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August 13, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, *et al.*,

Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, *et al.*,

Appellees.

BRIEF FOR THE NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE NATIONAL ASSOCIATION OF EPISCOPAL SCHOOLS, THE NATIONAL UNION OF CHRISTIAN SCHOOLS, THE NATIONAL CONFERENCE OF YESHIVA PRINCIPALS, AND THE LUTHERAN EDUCATION ASSOCIATION, AMICI CURIAE

INTRODUCTORY STATEMENT

The relevant facts, the statute involved, the applicable provisions of the First and Fourteenth Amendments, the questions presented on the appeal and the opinion of the court below are all set out in the respective briefs and appendices filed by the opposing parties.[1] These *amici* accept them for purposes of their own brief. Appellants and appellees have given their written consents to the submission of this *amici curiae* brief.

[1]The opinion of the three-judge court is officially reported in 310 F.Supp. 35 (E.D. Pa., 1969).

INTERESTS OF THE AMICI CURIAE AND THEIR POSITION ON THE ISSUES

A. *Identification of the Amici.* The five *amici curiae* in whose behalf this brief is submitted are nonprofit educational associations. They represent some 6,000,000 children enrolled in more than 14,000 schools which are served by nearly 250,000 teachers and staff. All five associations are dedicated to fostering and protecting the principles and ideals of American education, improving the quality of that education and preserving its accessibility to and influence on the youth of the Nation.

The National Catholic Educational Association (NCEA) is a voluntary organization founded in 1904. It is the oldest and largest professional organization of Catholic educators in the United States. NCEA serves 5,500,000 students, 206,000 educators and over 14,000 institutions, at all levels and in all areas of Catholic education. NCEA is governed by a Board of Directors, six of the members of which are elected by a Body of Delegates, composed of 15 representatives of each of the six existing departments of NCEA. The Delegates also elect the officers of the organization. Nine members of the Board of Directors are elected by the two present divisions of NCEA, that of Higher Education and that of Fundamental Education.

The National Association of Episcopal Schools is a nonprofit organization chartered in the State of New York. Membership in the Association is voluntary. Member schools are Episcopal schools owned or operated by, or under the jurisdiction of, a cathedral, dioceses, religious community or other recognized Episcopal organizations. Associate membership may be granted to schools which are not church-related but sympathetic to the aims and purposes of the Association.

The National Union of Christian Schools (NUCS) is a nonprofit educational association chartered in Michigan. It has been in existence for more than half a century. Almost

300 schools located in 26 states, as well as in Canada and Mexico, are affiliated with NUCS. Forty-two of the schools are high schools. Over 60,000 pupils attend schools affiliated with NUCS, and the total number of teachers and administrators on the staffs of these schools exceeds 2,700. Schools affiliated with NUCS are owned by associations of parents. They are operated on the principle that the parents have a primary responsibility for the education of their children.

The National Conference of Yeshiva Principals is the only national professional organization of principals of Yeshiva Hebrew day schools in the United States. The Conference is made up of the principals of 405 schools in 165 communities located in 30 states. These schools have an enrollment of some 80,000 students. The Conference is governed by a Board of Directors consisting of 18 members who are elected biannually at the national convention of the Conference.

The Lutheran Education Association (LEA), a voluntary organization, was founded 27 years ago to support Christian education and to serve the Christian educator. LEA is the only professional organization for educators in the Lutheran elementary and secondary schools. LEA serves 174,931 students, 1,271 institutions, and 7,704 educators in 43 states. The active membership of LEA numbers 2,714 and is composed of ministers of education, pastors and laymen. The Association is governed by nine board members, seven of these are elected by the total membership and two are on the board as representatives of specialized departments—directors of Christian education and principals of Lutheran elementary schools.

B. *The Concern of the Amici and Their Position on the Issues Raised.* The *amici* are aware that it is their association with their respective religious organizations which lies at the heart of appellants' challenge to the eligibility of nearly 550,000 school children attending nonpublic schools in Pennsylvania to benefit from the program enacted by the

State of Pennsylvania for the common welfare of the entire State by purchasing limited secular educational services performed in such schools, as provided for in the Pennsylvania Non-Public Elementary and Secondary School Act of 1968.[2]

The schools which these Pennsylvania school children attend are of the type represented by the *amici*. Appellants would have the Court accept the false notion that such schools are merely a type of Sunday School, primarily teaching religion, or at best, are mere catechetical instruments of various religious denominations with their secular education functions serving as a thin disguise for missionary or apostolic purposes. It is the interest of these *amici* first to defend themselves and the students who attend their schools against this erroneous constitutional caricature.

Secondly, and of equal imperativeness, they wish to report to the Court the national concern, experienced not only in Pennsylvania but throughout a majority of the States, over the continuing curtailment in the secular educational services offered by nonpublic schools due to the declining financial circumstances in which a great many of the nonpublic elementary and secondary schools now find themselves. This decline, in turn, is caused by the rapidly rising costs of education and the inability of such schools to obtain exclusively from private sources the amount of operating funds required if they are to continue to serve the public as an essential part of the American community of schools.

In pursuing these objectives the *amici* see no need to belabor two fundamental and extremely relevant propositions of ultimate fact made by the appellees in this case and previously accepted and applied by the Court, most recently in *Board of Education v. Allen*, 392 U.S. 236 (1968). These are: (1) that religious-related schools of the type for whom these *amici* speak "play a significant and valuable role in raising national levels of knowledge, compe-

[2]Act of June 19, 1968, No. 109; 24 P.S. (Purdon), Sec. 5601, *et seq.*

tence and experience"; and (2) that such "schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S., at 247.[3]

It is to the relief of the pressing problem of preserving the quality secular educational services the private schools carry on that the legislatures of a number of States, including Pennsylvania, have recently addressed themselves. Various statutory programs have been proposed, and some enacted, for the purpose of assisting nonpublic secular education, including the nonpublic secular education offered at the religious-related school.[4] These programs are aimed at preserving and improving secular education, not at aiding churches or establishing religions. This case involves the constitutionality of one such program, that adopted by Pennsylvania. There, limited assistance to nonpublic secular education is provided through agreements for the purchase of secular educational services entered into between the schools and the State.

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[3]Recent reliable studies, The Catholic Schools in Action (conducted by the University of Notre Dame) and The Education of Catholic Americans (conducted by the National Statistical Research Center of the University of Chicago), fairly report the grade or quality of the "secular education" provided by nonpublic religious schools "to their students." 392 U.S. at 247. For example, these studies show that over 80% of the students in Catholic elementary and secondary schools achieved "scores at or above the national norms." Moreover, both studies also concluded that the education offered at such schools also compiled impressive records in educating their students in other crucial areas, such as citizenship, moral and spiritual values, family relationships, parental involvement and post-school activities and achievements. There is every reason to believe that similar impressive secular educational achievements also obtain for the nonpublic schools affiliated with other religious denominations. In all respects, then, it would appear that the performance of the religious-related nonpublic schools justifies the observations of Mr. Justice White, speaking for the Court in the *Allen* case, concerning the quality of the secular education offered and received in such schools. 392 U.S., at 247-48.

[4]See note 15 *infra*.

It is the position of these *amici* that: (1) the financial problems of the nonpublic school are public problems about which the Pennsylvania legislature, and those in other States, are legitimately concerned; (2) the Pennsylvania statute represents an effective and constitutional coordination of parental and State rights; (3) the statutory program of limited state assistance to secular educational services performed by the private schools is an enhancement of academic freedom which comports fully with our constitutional and academic traditions; and (4) the purpose and primary effect of the Act are the assisting of secular activities, not religious activities; and the Act does not involve any "excessive governmental entanglement" in religion or religious activities.

THE BASIC QUESTION PRESENTED

The appellants attempt to present a number of questions for the Court to decide in this case. Some of these issues relate to the standing to sue on the part of several of the appellants. Another question deals with whether the court below properly dismissed the complaint for failure to state a claim upon which relief could be granted. On the substantive side, appellants would have the Court determine questions of equal protection and free exercise, as well as resolve the establishment issue. It is solely the last issue which appears to these *amici* to be determinative, at least so far as their own precise interests as private educators are concerned.[5]

However, the *amici* are aware that an Equal Protection Clause issue has been raised in this case. As educators,

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[5]Moreover, the other issues, both jurisdictional and substantive, are adequately treated in the briefs filed by the appellees. These *amici* concur in their exposition by the appellees.

amici are convinced that enforced segregation is an academic evil. *Amici* neither encourage nor tolerate such segregation in their member schools. Any school that is *de jure* segregated should be ineligible for government funds. Schools that are *de facto* segregated should, as a condition of eligibility for governmental assistance, make good faith efforts to remedy the situation and, where their own financial resources do not suffice, should receive governmental assistance for this purpose.

As these *amici* see it, the basic issue which the Court is asked to decide on the merits is whether the Pennsylvania statute which authorizes the State to purchase certain limited secular educational services performed in Pennsylvania's nonpublic schools—schools which comply with the state compulsory attendance law—violates the Establishment of Religion Clause of the First Amendment, as made applicable to the States through the Fourteenth Amendment to the Constitution of the United States. For the reasons they now state, the *amici* believe that that question should be answered in the negative and that the decision of the court below on this issue should be affirmed.

SUMMARY OF ARGUMENT

I.

The continuing and intensifying financial crisis which now afflicts private education in this Country raises serious doubts as to whether the nonpublic schools can continue doing their "acceptable job of providing secular education to their students." 392 U.S., at 247. Left unattended, the financial predicament of the nonpublic schools will generate a *public* educational crisis. If Pennsylvania does not provide some financial assistance to help keep nonpublic schools functioning at quality secular levels, Pennsylvania will have to provide—at enormously greater cost—public schools for most of the children now in church-related schools.

More, however, than money is at issue. If Pennsylvania does not channel its educational benefits through public and nonpublic institutions in a time of rapidly increasing costs, Pennsylvania will not reap the benefits of a pluralistic educational structure in a pluralistic society.

The expanding dimensions of the serious financial crisis which confronts the private, religious-related schools are attributable to causes that are not difficult to identify. Moreover, the inflationary rise in the costs of education have special manifestations in the private school sector, especially in respect to the religious-related private schools. Together, these causes have produced a significant decline in the number of religious-related private schools, especially on the elementary school level.

The administrators of the nonpublic schools, supported by a strong, continuous demand throughout the Country for the preservation of these schools, have employed many measures in an effort to deal with their burgeoning budgets. Despite these efforts, the financial crisis of the nonpublic schools, and especially that of the religious-related schools, continues unabated. It is that pressing public problem at which the Pennsylvania Act is directed. The justifiable concern of the public's legislative representatives in ameliorating the public dimensions of the problem is not open to argument.

II.

The Pennsylvania statute is in obvious harmony with the basic propositions of constitutional law which this Court has established in the field of child education. The Act effectively coordinates parental and State rights in the secular education of school children. State standards of secular academic exposure and achievement are set; State funds are provided to meet part of the cost of secular education; and parents are free to select either public schools or private schools for the education of their children.

The appellants, and their supporting *amici*, urge the destruction of this coordination of parental and State rights by asking the Court to hold that the exercise of a parent's constitutional right to send his child to a secularly qualified religious-related school forfeits another constitutional right he possesses, *i.e.*, participation in general benefits of a secular character which the State has decided to accord its citizens. Such a doctrine of forfeiture is without foundation in our constitutional and academic traditions.

These *amici* do not argue that Pennsylvania, or any other State, is under a constitutional obligation to enact a statute of the type before the Court. They argue only that Pennsylvania has the right to do so in order to achieve its goals of high quality secular education for all school children and in order to achieve more effective coordination of parental and state rights in the secular education of school children.

Since World War II, with the tremendous demand for equalization and improvement of secular educational opportunities, the Federal and many State governments have embarked upon a policy of providing secular educational assistance for all children in secularly qualified schools. There is nothing in American constitutional law that requires States to channel all their educational programs through public schools. Both States and parents are entitled to something better than an "all or nothing" choice.

III.

Moreover, the Pennsylvania program lends strong support to one of the most fundamental values in American constitutional law: the free exchange of ideas in the marketplace, and especially in the academic marketplace. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S., at 487. "The classroom is peculiarly the 'marketplace of ideas'." *Keyishian v. Board of Regents*, 385 U.S., at 603.

This Court long ago recognized the critical role that the nonpublic schools of America play in the preservation and development of academic freedom. When, in 1925, Oregon would have destroyed the nonpublic school system in that State, this Court unanimously affirmed the importance of educational diversity in this country. There can be no true freedom where there is no real diversity.

Without nonpublic schools, and without quality secular education in those schools, the Nation would be enormously poorer in its educational resources and therefore in the dynamism of its marketplace of truth. Public schools make an enormous and indispensable contribution to the Nation, but in recent years it has become apparent that many public public school systems suffer seriously from political pressures and bureaucracy. Moreover, the Constitution imposes a severe limitation upon the capacity of the public schools to deal with the central religious values of human life.

Nonpublic schools, with their greater capacity for innovation and experimentation, and with their freedom to explore the intellectual and moral dimensions of religion, provide an indispensable supplement to public institutions. Together with public institutions, they form the "American community of schools." By providing carefully limited assistance to preserve and improve secular education in nonpublic schools, the Pennsylvania statute has not only avoided any establishment of religion; it has actually enhanced academic freedom in America.

IV.

The appellants and their supporting *amici* read this Court's decision in *Walz v. Tax Commission*, 397 U.S. 664 (1970), to have displaced the secular purpose and primary effect test which this Court first enunciated in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), and first applied in *Board of Education v. Allen, supra*. To the contrary, careful analysis of the majority opinion in *Walz* establishes that:

(1) the Court in *Walz* did not displace the *Schempp* test as a primary guide for determining the boundary between permissible government involvement with *secular* activities and impermissible government involvement with *religious* activities; (2) the purpose and effect analysis was applied and found to have been satisfied in *Walz*; (3) this Court's decision in *Board of Education v. Allen, supra*, was expressly approved by the majority in *Walz*; (4) the majority in *Walz* found that houses of religious worship are the legitimate beneficiaries of an affirmative policy of the State that considers them "as beneficial and stabilizing influences in community life," despite the fact that it was not the secular activities of religious organizations which furnished the justification for the tax exemption at issue; and (5) language in *Walz*, in which the appellants and their supporting *amici* purport to take comfort, clearly referred to hypothetical government subsidies to *religious* activities–not to *secular* activities of the type for the assistance of which the Pennsylvania statute now before this Court was enacted.

In the view of these *amici*, what the *Walz* case did was to combine two doctrines that the Court had clearly enunciated in the past: the "secular purpose and primary effect" test of *Schempp* and the no excessive involvement guide. However awkward its application in the tax exemption area, the *Schempp* test clearly remains the formula for determining the constitutionality of a statute, such as Pennsylvania's, enacted in order to assist or improve secular education. That test thus remains as the primary guide or mechanism with the assistance of which the Court must traverse the "tight rope" of which the majority spoke in *Walz*, 397 U.S., at 672.

Analysis of the Pennsylvania statute shows no support for appellants' contention that the implementing administrative provisions of the Pennsylvania Act, under which the State supervises the use of its appropriated funds, constitute an excessive governmental "involvement" or "entanglement" with religion. A host of Federal and State programs, includ-

ing the New York textbook program which was upheld by this Court in *Board of Education v. Allen*, establishes that normal administrative prudence in overseeing a State program which involves expenditures of public funds does not constitute excessive State involvement with religious activities.

As to the danger of "divisiveness" or "fragmentation" to which appellants and their supporting *amici* point with alarm, there are two answers. First, for a number of years there have been in existence many Federal and State programs which have provided financial aid to the secular activities of religious institutions without generating the religious divisiveness about which our adversaries purport to be upset. Secondly, if the future does witness an increase in the amount or intensity of requests for financial assistance to the schools of various religious sects, the Pennsylvania legislature will be there to deal with such pressures, should they arise. Moreover, three years of operation under the Pennsylvania statute have not witnessed any emergence of the "fragmentation" and "divisiveness" which the appellants fear. Should such disturbing tendencies manifest themselves in the future, they "can be dealt with 'while this Court sits.'" 397 U.S., at 678.

ARGUMENT

I

THE FINANCIAL PROBLEMS OF THE NONPUBLIC SCHOOLS ARE PUBLIC PROBLEMS

The continuing and intensifying financial crisis which now afflicts private education in this Country raises serious doubt as to whether those schools can continue to properly perform their "task of secular education." 392 U.S., at 247. That crisis weighs especially heavily on the religious-related, nonpublic school. These schools, for the most part, educate the children not of the affluent, but of the lower and middle income classes of parents. The tuition which such schools can charge has a definite and restricted maxi-

mum level regulated by the modest financial means of the parents from whom such schools draw the great bulk of their students. As their financial predicament worsens, these schools will be required to curtail, and in some cases, to terminate, their secular educational operations, or else secure some form of public financial assistance if they are to continue doing their "*acceptable* job of providing *secular education* to their students." *Ibid.* (Emphasis supplied.)

What is constitutionally important about the financial problems of the parochial schools is that these problems, left unattended, generate a *public* educational crisis. Pennsylvania, it is true, has no stake in the churches that sponsor these schools, but Pennsylvania has an enormous stake in the children that attend them and the parents who freely choose the schools for their children's education. Pennsylvania cannot compel anyone to go to church, but it can and does compel attendance at secularly qualified schools.

If Pennsylvania does not provide some financial assistance to help keep nonpublic schools functioning at quality secular levels, Pennsylvania will have to provide—at enormously greater cost—public schools for most of the children now in church-related schools. By itself, of course, saving money is not a complete constitutional justification for anything. But it must be remembered that for over a hundred years many parents and churches in Pennsylvania have been saving the State money, by providing the secular education of a large percentage of the school children without any tax cost. These parents and churches never were, and are not now, under any legal obligation to continue this saving to the State. As the parents and churches find it more and more difficult to continue their public contributions at the former level, the State must think seriously about how to provide financially for the educational obligation it has always had but only now is being called upon to meet. The financial problems of the nonpublic schools are financial problems for the States, because the

nonpublic schools have been doing a job that the Sta must do if the nonpublic schools stop doing it. The Penns vania Act is that state's recognition of, and response to, own State problem.

More, however, than money is at issue. If Pennsylva does not channel its educational benefits through bo public and nonpublic institutions in a time of rapid increasing costs, Pennsylvania will not reap the benefits a pluralistic educational structure in a pluralistic societ This Court has said that *parents* have the right to choose competent nonpublic school for the education of the children, and that *States* have the right to enact compu sory education laws with reasonable standards of academ exposure and achievement. If both parents and States ha these rights, then the States must also have the right choose a pluralistic structure for their secular education programs. Again, the statute represents a practical dete mination by Pennsylvania for the preservation of th cherished pluralism which furnishes one of the great bu warks of America's unique democracy.

The expanding dimensions of the serious financial crisi which confronts the private religious-related schools ar attributable to causes that are not difficult to identify. Pri mary in its impact, of course, is the precipitous inflationary rise, especially over the last ten years, in the operating costs necessarily incurred in producing the high quality of secular education, both public and private, which American parents demand for their children. However, this inflationary spira has special manifestations and is accentuated by uniquely contributing factors in the private school sector, especially in respect to the religious-related private schools.[6] In that

[6]Nationally, 12% of all American school children attend nonpublic schools. Approximately 90% of these children attend schools affiliated with religious organizations. In the State of Pennsylvania 20% of the school children attend nonpublic schools. In the Pittsburgh metropolitan area 29% of the school children attend nonpublic schools. In the Philadelphia metropolitan area 34% attend nonpublic schools. For further statistics see Brief for Appellee Schools, pp. 11 and S-13.

area, teachers' salaries and related administrative costs doubled in the ten-year period from 1958 to 1968. Since 1968 they have continued to climb at an even higher rate of acceleration. Such increases have had a special impact on the budgets of private schools where, on the average, 70% of the school budget is consumed by operating costs.

Many of the religious-related schools, especially the great majority of Catholic elementary and secondary schools, have had their budgetary problems compounded by another, quite singular phenomenon in recent years. During the same period when teachers' salaries were rising and classes were being decreased in size in order to provide better education, the ratio of religious volunteers to lay teachers experienced a rapid and severe change. Ten years ago three-fourths (3/4) of the teachers in the Catholic school systems of the Country were religious personnel and only one-fourth (1/4) were laymen. Last year, however, approximately 45% of those teachers were lay persons. Unofficial statistics, not yet finally confirmed, indicate that in the school year of 1970-71 just about 50% of the teachers in the Catholic elementary and secondary schools will be lay teachers. Most religious volunteers receive only minimal financial compensation, whereas lay teachers must be paid a salary sufficient for them to support their families and themselves.[7] It is true that these lay teachers, on the average, are receiving compensation for their services which is somewhat below their public school counterparts. Nevertheless, religious-related schools are under a moral obligation to pay their teachers and administrative staff what basic social justice commands. As a consequence, a nearly 100% increase in the number of lay teachers in the Catholic elementary and secondary schools of the Country during the last ten years has placed a tremendous strain on the ability of such schools to continue to provide the secular

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[7]Surely, the decline in the number of persons willing to work for practically nothing is not an exclusively religious phenomenon in America; nor is it a constitutional bar to the States' starting to pay for what they were always obligated.

education which, for so long, they have offered to a significant portion of America's youth.

In the light of these statistics, it is not surprising that the total number of religious-related private schools and the number of students attending them, especially on the elementary school level, have declined significantly in each of the last five years.[8] Moreover, when private school enrollment decreases, there is usually a corresponding *pro tanto* increase, or nearly so, in public school attendance, along with an increase in public school expenditures required to accommodate the influx of new students into already financially overburdened public school systems. In New York, for example, from 1965 to 1970 Catholic school enrollment decreased by a total of 90,726 pupils, of which more than a third (32,202) occurred in the 1969-70 school year. At present, New York annually expends $1,134 per pupil in educating its children in the schools of the State. The profound financial impact of any substantial transfer of pupils formerly attending Catholic schools upon the New York public school system, especially in its large urban areas which already labor under a heavy financial and educational load, is obvious.[9]

Yet, administrators of the nonpublic schools, supported by a strong, continuous demand throughout the Country for the preservation of these schools, have not given up the struggle in the face of the growing financial crisis which has been visited upon their schools. They have employed many measures in an effort to deal with their burgeoning budgets.

[8]For instance, in 1965 there were 10,879 Catholic elementary schools in the United States, at which 4,492,107 pupils were in attendance. In 1969 the number of elementary schools was 10,338, and 3,902,487 pupils attended those schools. Catholic Education Today: An Overview, Office of Public Information, NCEA (1969).

[9]Estimates of School Statistics 1969-70, NCEA (1970); Estimates of School Statistics 1969-70, copyrighted 1969 by the National Education Association. The increase attributable to the enrollment in New York public schools in 1969-70 of students who formerly attended Catholic schools has been estimated to be over one hundred million dollars ($100,000,000) for the 1969-70 school year. *Ibid.*

They have raised tuition to the limits of the parents' ability to pay, an ability that has definite marked limitations, which, in the majority of cases, have now been reached. They have consolidated and eliminated grades. They have reduced non-essential activities to a minimum. They have solicited the private sector for contributions. They have sought, and in some instances have received, some assistance under Federal and State aid programs. Finally, and most unfortunately, in some cases, and with increasing frequency, nonpublic schools have been closed.

Very few nonpublic schools have been able to maintain a balance between tuition income and the rising costs of education. Religious-related nonpublic schools almost without exception receive financial support in very large measure from the church congregations. In some cases tuition charges represent only a nominal portion of the entire costs of school operations. Unfortunately, the ability of the representative churches to continue to finance schools solely on the basis of tuition and contributions is now subject to serious challenge. It is clear that the parents of students who attend such schools are already overburdened with tuition and other obligations. Many cannot afford even the level of tuition that is now charged, much less being able to meet the tuition that would have to be charged if the schools were to be placed on a "tuition equals expenses" basis.

This, then, is the pressing public problem at which the Pennsylvania Act is directed. Its dimensions are large; and the justifiable concern of the public's legislative representatives in ameliorating it is not open to argument. *Amici* next show in the remaining portions of their brief that the means chosen by the legislature to solve this public problem coordinate the rights of parents and State, enhance academic freedom, and are in accord with the prior controlling decisions of this Court in the field of State and Church constitutional law.

II

THE PENNSYLVANIA STATUTE IS AN EFFECTIVE COORDINATION OF PARENTAL AND STATE RIGHTS IN THE SECULAR EDUCATION OF CHILDREN.

Numerous decisions of this Court have established three basic propositions of constitutional law:

(1) States have the right to enact compulsory education laws that set reasonable standards for the secular education of all children of school age;[10]

(2) States have the right to spend public funds for the secular education of all school children;[11] and

(3) Parents have the right to select private nonsectarian or religiously affiliated schools that meet the secular standards of the compulsory education laws.[12]

The Pennsylvania statute now before this Court is obviously in harmony with these three basic propositions. The statute effectively coordinates parental and State rights in the secular education of school children. State standards of secular academic exposure and achievement are set; State funds are provided to meet part of the cost of secular education; and parents are left free to select either public schools or private schools for the education of their children.

Appellants would destroy this coordination of parental and State rights by having the Court hold that the exercise of one constitutional right (sending a child to a secularly qualified parochial school) forfeits another constitutional

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[10] *Meyer v. State of Nebraska*, 262 U.S. 390 (1923); *Epperson v. State of Arkansas*, 393 U.S. 97 (1968); *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503 (1969).

[11] *Cochran v. Louisiana State Bd. of Education*, 281 U.S. 370 (1930); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968).

[12] *Pierce v. Society of Sisters* and *Pierce v. Hill Military Academy*, 268 U.S. 510 (1925).

right (participation in general benefits of a secular character that the State has decided to accord its citizens). Such a doctrine of forfeiture, however, is without foundation in our constitutional and academic traditions. Indeed, in recent years, this Court has made it quite clear that the States and the Federal Government cannot condition the exercise of one constitutional right upon the surrender of another.[13]

Appellants, of course, contend that a constitutional right to do something is not a constitutional right to do it at public expense. This argument misses the point. First of all, although one is free to worship or not as he judges right in his own conscience, one is not free to send or not send his child to school. The State has the right to compel school attendance, and therefore the State has the right to facilitate school attendance. Since the State cannot mandate attendance for all children at public schools, the State must have the right to facilitate attendance by children, for secular educational purposes, at both public and nonpublic schools.

Secondly, *amici* are not arguing that the State of Pennsylvania, or any other State, is under a constitutional obligation to enact the present statute. *Amici* are arguing only that the State of Pennsylvania has the right to do so in order to achieve its goals of high-quality secular education for all school children and in order to achieve a more effective coordination of parental and State rights in the secular education of school children.

The Pennsylvania statute is typical of a trend that has developed at both the Federal and State level since World

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[13]See, for example, *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) and *United States v. Jackson*, 390 U.S. 570, 581-82 (1968). See also *Keyishian v. Board of Regents*, 385 U.S. 589, 605-6 (1967) for a definitive exposition of the doctrine that eligibility for participation in governmental "privileges" cannot be conditioned upon the surrender of constitutional rights.

War II and especially during the last decade. The Federal Government has enacted a number of statutes providing assistance for secular education in both public and nonpublic schools,[14] and many State governments have followed suit.[15]

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[14]Among the most important Federal programs providing secular assistance at the elementary and secondary level are the following: National School Lunch Act of 1946, 42 U.S.C. §§ 1651 ff.; Federal Property and Administrative Services Act (Surplus Property) of 1949, as amended, P.L. 78-457, P.L. 81-152; National Defense Education Act of 1958, 20 U.S.C. §§ 15 ff.; Manpower Development and Training Act of 1962, 42 U.S.C. §§ 2571 ff.; Educational Television Act of 1962, 47 U.S.C. §§ 390 ff.; Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701 ff.; and the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236 ff.

On the collegiate and university level, Congress has repeatedly evinced the same legislative judgment that secular educational assistance should be provided to both public and nonpublic institutions. The following statutes are particularly noteworthy: National Science Foundation Act of 1950, 42 U.S.C. §§ 1861 ff.; College Housing Amendments of 1955, 12 U.S.C. § 1749; Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701 ff.; Higher Education Act of 1965, 20 U.S.C. §§ 403 ff.; National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. §§ 784 ff.; Education Professions Development Act of 1967, 20 U.S.C. §§ 1091 ff.; Library Services and Construction Amendments of 1967, 20 U.S.C. §§ 355, 358.

For a comprehensive list of Federal educational programs currently in force, see the index in Catalog of Federal Domestic Assistance (OEO; Jan. 1969) s.v. "Education" and "Educational . . ."

[15]Twenty-three States currently provide transportation services for children attending secularly qualified nonpublic schools: California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and West Virginia. Other areas in which the States have extended assistance to both public and nonpublic schools include health services (*e.g.*, Connecticut, New Hampshire, New York and Pennsylvania), textbooks (Connecticut, Indiana, Louisiana, Michigan, Mississippi, New Mexico, New York, Ohio, and Rhode Island), and driver education (Connecticut, Ohio, and Pennsylvania).

Far more important, however, than statutes dealing with transportation, textbooks, health services, and driver education are the State

This trend represents a definite evolution in American educational policy. Prior to the Civil War, there were no public schools to speak of and such public assistance as was given to education was channeled through private organizations. With the rise of the public school movement after the Civil War, valid economic, administrative and other policy considerations led most States to channel educational benefits only through public schools (although tax exemptions and certain public services were maintained for nonpublic schools). Now, in the modern period, with the tremendous demand for equalization and improvement of secular educational opportunities, the Federal and many State governments have embarked upon a policy of providing secular educational assistance for all children in secularly qualified schools.

Appellants seek to prevent this legislative choice of educational policy on strictly religious grounds. In the process they destroy parental and State rights that do not depend upon religion for their existence.

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programs that, like Pennsylvania's in the instant case, demonstrate the gravity of the State legislative judgments that assistance to secular education in nonpublic as well as public schools is both necessary and desirable. Pennsylvania enacted its statute in 1968. In 1969, Connecticut and Rhode Island enacted, respectively, the Non-Public School Secular Education Act (Public Act 791) and the Teachers Salary Supplement Act (R.I. Gen. Laws Ann. § 15-51-3). In the same year, Ohio enacted the Supplementary Education Services Act (Ohio Rev. Code § 3317.06(H). In 1970, three more States with large numbers of children in nonpublic schools passed basic assistance legislation: Louisiana, Michigan and New York (Louisiana Secular Educational Services Act, Act 223, 1970 Rev. Stat.; Michigan Teachers Salary Supplement Act, Mich. Stat. Ann. § 15.1919; and New York Mandated Services Act, Laws of 1970, ch. 138).

The trend is clear: the State legislatures know that a public educational problem exists and that something must be done about it. To see in this mass of legislative activity, as some of the appellants and other *amici* do, nothing more than a thinly veiled attempt to establish religion (Roman Catholic or otherwise) is, to say the least, politically and educationally myopic.

There is nothing in American constitutional law that requires States to channel all their educational programs through public schools. Both States and parents are entitled to something better than an "all or nothing" choice. Whatever restrictions the No Establishment and Free Exercise Clauses impose on State action in the educational area, they do not canonize the public school as the only constitutional instrumentality of secular education.

States are free to make public schools available to all those who desire a public school type of education. The States are also free to devise alternative and limited forms of secular educational assistance for those who find the public school system too narrow or too broad, too orthodox or unorthodox a structure and atmosphere for the kind of upbringing they have chosen for their children. In devising these alternatives to the public school system, States must, of course, comply with the Fourteenth Amendment and other relevant sections of the Federal Constitution. That such compliance is possible has already been demonstrated by the decisions of this Court in *Everson v. Board of Education, supra,* and *Board of Education v. Allen, supra.* That such compliance is also present in the Pennsylvania statute now before this Court will be evident from an analysis of it in the light of *Abington School District v. Schempp*, 374 U.S. 203 (1963) and *Walz v. Tax Commission*, 397 U.S. 664 (1970), *infra,* pp. 29-39.

III

THE PENNSYLVANIA STATUTE IS AN IMPORTANT ENHANCEMENT OF ACADEMIC FREEDOM

Before proceeding, however, to the *Schempp* and *Walz* analysis, *amici* wish to emphasize another important, but perhaps less immediately apparent, facet of the Pennsylvania statute. In addition to coordinating the rights of parents and of the States, the Pennsylvania program lends strong support to one of the most fundamental values in American constitutional law: the free exchange of ideas in the marketplace, and especially in the academic marketplace.

Mr. Justice Holmes first judicially formulated this transcendent value in his famous dissent in *Abrams v. United States*:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[16]

During the fifty years since Holmes penned his memorable dissent, this Court has fully adopted the marketplace principle and has made it the basis of scores of landmark cases dealing with freedom of thought and of speech, freedom of association, and freedom of religion. In no area, however, has the Court been more insistent on the application of this principle than in the area of academic freedom. As the Court said quite recently in *Keyishian v. Board of Regents*:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S., at 487. The classroom is peculiarly the "marketplace of ideas."[17]

In recent years this Court has relied increasingly upon the First Amendment as the guarantee of academic freedom. It is worth noting, however, that even before the First Amendment was applied to the States through the Fourteenth, this

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[16] 250 U.S. 616, 630 (1919).

[17] 385 U.S., at 603.

Court declared that the Fourteenth, of and by itself, protected academic freedom. As Mr. Justice McReynolds explained for the Court in one of the first cases applying the Fourteenth Amendment to educational legislation, the word "liberty" in the Due Process Clause includes a wide range of freedoms, including the right to teach and learn.[18] "The American people," he said, "have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[19] The same fundamental proposition has been emphasized repeatedly by this Court in First and Fourteenth Amendment cases in the last two decades.[20]

It is settled, then, that the free exchange of ideas is essential to the vitality of the Nation, and that academic freedom is essential to the free exchange of ideas. On the strength of these propositions, this Court has defended academic freedom "in the community of American schools," both in the colleges and universities[21] and in high schools and grammar schools.[22] It does not matter whether these institutions be public or private: teachers and administrators, parents and students enjoy that freedom to learn and to teach without which America cannot survive as a free nation.

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[18] *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

[19] *Id.* at 400.

[20] See, for example, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *Board of Education v. Allen*, 392 U.S. 236, 247-48 (1968).

[21] *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967).

[22] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969).

Moreover, this Court has long since recognized that the nonpublic schools of America play a critical role in the preservation and development of academic freedom. There can be no true freedom where there is no real diversity. In 1925, confronted with a statute that, in the name of promoting American unity, would have destroyed the nonpublic schools, this Court said:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[23]

In *Board of Education v. Allen*, Mr. Justice White, speaking for the Court, advanced two "corollaries" of the *Pierce* decision: the right of the States to regulate secular education in the nonpublic schools, and the right of the States to facilitate such education through carefully limited programs of secular assistance.[24] It is time now for the Court to reaffirm unmistakably the harmony of the *Pierce-Hill* decision and its corollaries with the highest traditions of American academic freedom. The Pennsylvania statute, as an implementation of one of those corollaries, is not only not an establishment of religion; it is an important enhancement of academic freedom.

Without nonpublic schools, and without quality secular education in those schools, the Nation would be enormously poorer in its educational resources and therefore in the

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[23] *Pierce v. Society of Sisters* and *Pierce v. Hill Military Academy*, 268 U.S. 510, 535 (1925). As many commentators have pointed out, the reasoning of this decision rests solidly on Fourteenth Amendment parental and educational rights, not on the free exercise of religion.

[24] 392 U.S., at 246-247.

dynamism of its marketplace of truth. This is immediately apparent at the college and university level: Take away the great private colleges and universities like Harvard, Columbia, Notre Dame and Southern Methodist, and you have impoverished the Nation. Although perhaps less obvious at the grammar and high school level, it will not take much reflection to perceive that a similar impoverishment would occur if the nonpublic elementary and secondary schools of the country were to substantially dwindle in variety and number or to degenerate in the quality of their secular education.

What is it that has kept American private educational institutions alive, especially at the elementary and secondary level? It is, in part, the conviction that the study of religion and the formation of religious habits are indispensable parts of any sound educational process. But it is also, and very importantly so, the conviction that public schools, precisely because they are governmental schools, operate under certain unavoidable academic liabilities, especially the constant pressure of the currently dominant political opinion and the intrinsic tendency of any political organization towards bureaucracy.

The reality of the danger from political pressures needs no demonstration to this Court. The increasing frequency with which this Court has been called upon to decide academic freedom cases is well known to all its members. If there were no serious and pernicious political pressures, the decisions from *Meyer* to *Tinker* would never have been rendered.[25]

The danger from bureaucracy is no less real. Public schools are governmental schools, and governments are–or become–bureaucracies. As already noted, States have the right to set reasonable secular standards for all schools, public and nonpublic; but States have to operate public schools, and the volume of public school legislation grows every year. This is an unavoidable price that Americans

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[25] See citations in note 22, *supra*.

willingly pay for the enormous benefits derived from the public schools; but in recent years it has become apparent that many public school systems suffer in their capacity for originality, innovation and experimentation. Some problems drag on for years and years, not only because the political will to cure them is lacking, but because there is not enough academic stamina to survive the red tape.

Nonpublic schools, of course, are no paradise. They too suffer, all too frequently, from organizational tendencies to bureaucracy and from conservatism. As a group, however, nonpublic schools, precisely because they are less subject to regulation than their public counterparts, have greater opportunities for experimentation and innovation. That is why nonpublic schools do not want total governmental assistance; for they are well aware that with more assistance comes more regulation. Partial governmental assistance makes it possible for nonpublic schools to maintain quality secular education without losing their greater capacity for change and experimentation.

Nonpublic schools also provide a different frame of intellectual and moral discourse than that permitted in the public schools. As a result of this Court's decisions in *McCollum*, *Engel* and *Schempp*,[26] it is evident that public schools can "teach about" religion, but that they may not make religion an integral part of the school atmosphere and orientation. This limitation on the capacity of the public schools to relate to the central values of human life derives from the First and Fourteenth Amendments, which forbid the Federal and State governments to espouse any religion in the public schools.

It is the conviction of many Americans that an educational system that does not take religion seriously *on the academic level* is an educational system that has closed itself,

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[26] *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *School District v. Schempp*, 374 U.S. 203 (1963).

at least in substantial measure, to a vital dimension of human experience and human truth. At the very least, a nation in which such a system educates most of the youth needs a supplementary system to preserve its openness to the total marketplace of human ideas. Anyone who takes that marketplace seriously knows that it must not become a government store. Pennsylvania's statute seeks to avoid that intellectual dead-end, without embroiling the State in religious affairs or subsidizing religious formation, by a carefully designed program of secular assistance for quality secular education.

There are some, of course, who would deny that church-related schools provide secular education at all. For them, secular education is not secular education when religion has been added. They see religion, especially organized religion, as an intransigent foe of academic freedom, of the human search for truth, and of the very concept of a marketplace of ideas.

Fortunately, this Court has already clearly rejected this caricature of religion and the church-related school. In *Board of Education v. Allen, supra*, the dual function of the secularly qualified church-related school was clearly perceived and defined.

A school is a school, not a church. A school does not lose the character of a school by virtue of teaching moral principles and religious beliefs. Certainly, denominational schools and particular churches bear relations to one another. But relationship and substantive identity are very different. The point was well made over sixty years ago by the then Solicitor General of the United States, Henry Martyn Hoyt, in the argument he presented to the Court in *Quick Bear v. Leupp.*[27] The Solicitor General said:

> The Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." A religious

[27] 210 U.S. 50 (1908).

> establishment, however, is not synonymous with an establishment of religion. See Bradfield v. Roberts, 175 U.S. 291, upholding an appropriation for a Roman Catholic hospital. A school, like a hospital, is neither an establishment of religion nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in morality and religion, just as in a hospital there would be religious ministrations.[28]

Important, however, as nonpublic schools are to academic freedom and the marketplace of ideas in the United States, State programs that seek to preserve and improve the quality of secular education in such schools must satisfy the requirements of the Fourteenth Amendment with respect to the relationships that such programs create between Church and State. *Amici*, accordingly, will conclude their argument by showing that the Pennsylvania program is fully in accord with Fourteenth Amendment requirements, as elaborated by this Court in *School District v. Schempp* and *Walz v. Tax Commission.*

IV

THE PENNSYLVANIA STATUTE SATISFIES THE *SCHEMPP* TEST AND IS IN ACCORD WITH BOTH THE RESULT AND RATIONALE IN *WALZ.*

This case was decided in the court below prior to the announcement of the decision of this Court in *Walz v. Tax Commission*, 397 U.S. 664 (1970), and the Court's opinion in *Walz* thus was not available to the lower court for guidance in reaching its decision. The appellants now argue that this Court's decision in *Walz* argues against the constitutionality of the Pennsylvania statute challenged in this litigation.[29] Several of the *amici* supporting the appellants

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[28]Brief of the Solicitor General, No. 569, October Term, 1907, p. 74.

[29]Brief for Appellants, pp. 17, 18, 42 and 43.

make the same contention.[30] And a three-judge federal court for the District of Rhode Island, in holding unconstitutional a statute which provided for the payment of state funds to teachers of secular subjects in nonpublic elementary schools, appears to have adopted such a view of the *Walz* decision. *DiCenso v. Robinson, et al.*, ____ F. Supp. ____, (D. R.I., 1970).[31] The contention that the Court's decision in *Walz* requires a finding of unconstitutionality in this case is based on the assumption that in *Walz* this Court displaced the test it enunciated in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), and followed in *Board of Education v. Allen, supra*; *i.e.*, "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." As put in its strongest terms by one of the *amici curiae* supporting the appellant, this argument is that "the *Schempp* test has been superseded by *Walz*", this Court in the latter case "having studiously avoided application of the *Schempp* test", and having stated the second half of that test not in terms of "effect", but in terms of "entanglement".

With all respect to the appellants, *Walz* holds the very opposite. It is our contention that: (1) the Court in *Walz* did not displace the *Schempp* test as a primary guide for determining the boundary between permissible government involvement with *secular* activities and impermissible government involvement with *religious* activities; (2) the purpose and effect test, first enunciated by the Court in the *Schempp* case, was found to have been satisfied in *Walz*; (3) this Court's decision in *Board of Education v. Allen*,

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[30]Brief of Protestants and Other Americans United for Separation of Church and State, *Amicus Curiae*, p. 18; Brief of the American Association of School Administrators, *et al.*, *Amici Curiae*, pp. 30-37; Brief of American Jewish Committee, *et al.*, *Amici Curiae*, pp. 21-25.

[31]On June 27, 1970, this Court stayed the operative effect of the lower court's ruling in *DiCenso*.

supra, was expressly approved by the majority in *Walz*; (4) the majority in *Walz* found that houses of religious worship are the legitimate beneficiaries of an affirmative policy of the State that considers them "as beneficial and stabilizing influences in community life", despite the fact that it was not the secular activities of religious organizations which furnished the justification for the tax exemption at issue; and (5) language in *Walz* in which the appellants and their supporting *amici* purport to take comfort clearly referred to hypothetical government subsidies to *religious* activities--not to *secular* activities of the type for the assistance of which the Pennsylvania statute now before this Court was enacted. Mr. Chief Justice Burger wrote for the majority in *Walz*. Analysis of his opinion confirms these conclusions concerning its construction and effect.

At the outset, the Chief Justice defines Establishment of Religion, as understood by the framers of the First Amendment, to connote "sponsorship, financial support and active involvement of the sovereign in *religious activity*." (Emphasis supplied.) 397 U.S., at 668. That definition squares with the decisions which this Court has handed down in the Church and State field. Thus, for example, prayers in the public schools have been prohibited because that would be sponsoring religious activity. *School District of Abington Township v. Schempp, supra*. Direct grants in support of religious activity likewise would violate the First Amendment. *Everson v. Board of Education*, 330 U.S., at 16-17: see also *Flast v. Cohen*, 392 U.S. 83, 98, n. 17 (1968). And state involvement in doctrinal religious disputes would also be condemned as impermissible involvement of the sovereign in religious activity. *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368-370 (1970) (Brennan, J. *concurring*). In each instance, however, the government action offensive to the First Amendment is action directed toward or involved with "religious activity".

After defining the government actions which are embraced within the prohibitions of the Establishment Clause, the majority in *Walz* make clear that the purpose of the Religion Clauses of the First Amendment was "to state an objective, not to write a statute". 397 U.S., at 668. The majority then notes that what seemingly might appear to be "considerable internal inconsistency in the opinions of the Court" in the Church-State field "derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." Among these, the Court in *Walz* specifically singles out the "no aid" *dicta* appearing in the majority opinion in *Everson.*[32] 397 U.S., at 670.

At this point, the Chief Justice pauses to approve of the results reached both in *Everson* and in *Board of Education v. Allen, supra.* As to the bus transportation payments to parents of children in religious-related schools which were upheld in *Everson*, the *Walz* opinion acknowledges that such public programs "to pupils who receive religious instruction 'aid' that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." "Similarly," said the Chief Justice:

> "... making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment [citing *Board of Education v. Allen*]."[33]

In reaffirming the results which it had reached in *Everson* and in *Allen*, the majority's opinion in *Walz* acknowledges

[32] 330 U.S., at 15.

[33] 397 U.S., at 671-72.

that there are "risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, . . ." Nevertheless, the Court has "been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." The charting of this course, said the Chief Justice, is a " 'tight rope' and one we have successfully traversed." 397 U.S., at 672.

Up to this juncture, there is nothing in the majority opinion in *Walz* which can be construed as either a modification or repudiation of the *Schempp* test or a disavowal of the *Allen* holding in which the *Schempp* test was expressly applied for the first time to a governmental program assisting the secular education activities of a religious-related school and where the state aid provided was of "an enormous aggregate cost"[34] and where also were involved administrative procedures established in order to insure that New York's textbook program was carried out in accordance with the statute.

The majority in *Walz* then concluded that the legislative "purpose" of the New York property tax exemption constituted "neither the advancement nor the inhibition of religion; . . ." Specifically, they stated that houses of worship fell within a broad class of property owned by nonprofit, quasi-public corporations and were entitled to be the beneficiaries of "an affirmative policy" of the State of New York "that considers these groups as beneficial and stabilizing influences in community life, . . ." 397 U.S., at 673. If a house of worship, which is concerned primarily, if not in many cases exclusively, with the conduct of "religious activities" may be the beneficiary of "an affirmative policy" of the State, *a fortiori* a religious-related school which performs secular educational services or activities can also qualify for state assistance that runs only to those secular functions or activities, but not to the religious activities of

[34] *Ibid.*

either the school itself or the religious group or organization with which the school is affiliated.

Having found that the New York property tax exemption law had its origins in a legislative purpose that was secular and not religious, the majority opinion next turns to the question of the "effect" of the New York statute, a determination in which the Court had to assure itself "that the end result—the effect—is not an excessive government entanglement with religion." 397 U.S., at 674. These *amici* understand the Court's decision in *Walz* of this issue clearly to have followed the purpose and effect analysis of the *Schempp* test.

However, it is true that the *Schempp* test "is not easy to apply", as this Court frankly acknowledged in the *Allen* case.[35] This is especially so in the case of tax exemptions for religious property or activities. In that area, taxation unavoidably "hurts" and exemption unavoidably "helps" religion. In such circumstances, where the effects on religion are immediate, substantial and necessarily either helpful or hurtful, the guidelines provided by the *Schempp* test are obviously more difficult to apply. Nevertheless, a majority of the Court in *Walz* was able to find that the "effect" of the religious tax exemptions involved did not constitute government sponsorship of religion within the prohibitions of the Establishment Clause, since there was no "excessive government entanglement" or "involvement of the sovereign in religious activity." The *Walz* emphasis on avoiding such entanglement and involvements was clearly foreshadowed in this Court's pronouncements on the constitutional guidelines for judicial settlement of church property disputes. See *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S., at 368-70 (Brennan, J. *concurring*); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440 (1969), and cases cited therein.

[35] 392 U.S., at 243.

In short, what the *Walz* case did was to combine two doctrines that the Court had clearly enunciated in the past: the secular purpose and primary effect test of *Schempp*, and the no excessive involvement guide.

Whatever the difficulties of applying the *Schempp* test to religious tax exemptions, that difficulty is not present in the instant case. Indeed, it is reasonable to assume, we believe, that the *Schempp* test was specially designed to govern situations, such as that now before the Court for review, in which the government asserts a secular justification for affirmative public activities and expenditures affecting religious-related institutions, such as schools and hospitals. As such, the test serves well in drawing a clean line between *forbidden* use by government of religious means for secular ends and *permissible* use by government of secular means, to take this case, for the improvement of secular education of all school children, regardless of the secular or the religio-secular character of the school they attend. Thus, it is fair to say that the *Schempp* test, whose application in the religious tax exemption area is somewhat awkward, clearly remains the formula for determining the constitutionality of a statute, such as Pennsylvania's, enacted in order to assist or improve secular education. In the field of public expenditures, the *Schempp* test is the primary guide or mechanism with the assistance of which the Court has walked, and shall continue to traverse, the "tight rope" of which the Chief Justice spoke in *Walz*.

However, the appellants and their supporting *amici* cite a language in the *Walz* opinion which, they claim, bolsters their contention that the Pennsylvania statute is an "excessive" and, therefore, unconstitutional "involvement" with religion under the *Schempp*, *Walz* or any other test of the reach of the Establishment Clause. The language reads:

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relation-

> ships for enforcement of statutory or administrative standards, . . ."[36]

The language on which they rely cannot carry the argument in whose cause it is offered. The words occur in a paragraph in which the majority opinion is comparing the grant of "tax exemptions to churches", as opposed to taxing churches or granting subsidies to churches or religious *activities.*[37] There is no dispute that the government would be barred by the First Amendment from subsidizing churches, *qua* churches, for it then would be either sponsoring, supporting, or involved with, "religious activity". 397 U.S., at 668. As Mr. Justice Brennan stated it in his concurring opinion in *Walz:* "General subsidies of religious activities would, of course, constitute impermissible state involvement with religion."[38] And in his concurring opinion Mr. Justice Harlan also adverted to the distinction between secular and religious activities, saying:

> "To the extent that *religious institutions* sponsor the *secular activities* that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions." (Emphasis supplied).[39]

Thus, these *amici* read the *Walz* decision as (1) preserving the fundamental distinction between affirmative programs of governmental aid which are directed toward assisting secular activities and those which aid, or involve the government with, religious activities, and (2) also preserving the *Schempp* test as the primary formula or guide for determining on which side of the constitutional line a particular statute or governmental programs falls. However, the appellants and their

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[36] 397 U.S., at 675.

[37] Emphasis supplied.

[38] 397 U.S., at 690.

[39] 397 U.S., at 697.

supporting *amici* make the further argument that even if its purpose and primary effect were to aid secular education, the Pennsylvania statute still must fail because it requires "excessive" governmental "involvement" or "entanglement" in religion, arising out of the administrative provisions of the statute under which the State government polices or supervises the manner in which its appropriated funds are dealt with under the purchase of services program.

Surely, it is not unusual for the government in sponsoring programs in which private organizations, including religious-related schools or hospitals, for example, participate, to make provision for statutory and administrative standards that must be observed for the protection of the state and its taxpayers. In *Board of Education v. Allen*, for instance, the Court was aware that there were implementing procedures governing the distribution of state purchased textbooks to pupils in nonpublic, including religious-related, schools.[40] There was no suggestion in this Court's opinion in *Board of Education v. Allen* that normal administrative prudence in overseeing a state program involving expenditure of public funds results in unconstitutionally involving the State of New York with any religious activities of the parochial schools of the State or of the religious organizations with which those schools were affiliated. So, too, here, the State of Pennsylvania cannot be held to have involved itself excessively with any religious activities, either of the nonpublic schools or of the churches with which they are affiliated.[41]

Finally, it is appellants' concern, and that of their supporting *amici*, that in the future the Pennsylvania statute may invite bitter competition on the part of religious sects to secure the type of assistance provided by the statute and that this in turn will lead to the "fragmentation" of the

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392 U.S., at 244, n.6.

Moreover, it should be noted that, apart from Act 109, Pennsylvania has enacted extensive regulations of secular education in its nonpublic schools. See Brief for Appellee Schools, pp. S. 35-42.

American body politic which the Religion Clauses of th First Amendment were designed to prevent. There ar two answers to that contention. First, as the appellees hav pointed out in their brief,[42] for many years there has bee in existence a great number of Federal[43] and State program which have provided financial aid to the secular activitie of religious institutions, such as schools, hospitals, orphan ages, homes for the aged, *etc.* Yet, there has not occurre in this Nation the religious divisiveness which the appellant claim they fear.

Secondly, if the future does produce an increase in the amount or in the intensity of supplications from various religious sects that wish either to expand their present schools or to establish new school systems, the Pennsylvania legislature will be there to deal with such pressures should they arise. The argument that programs of governmental assistance clearly within a legislature's power to approve must be set aside because the future may witness pressure from religious groups to expand the scope or increase the amount of such programs is not one of constitutional law, whatever its status as *in terrorem* rhetoric. "[A]larms, however, are not arguments", *United States v. Ohio Oil Co.*, 234 U.S. 548, 575 (1914); and to "push propositions to the extremes to which they . . . [might theoretically] lead is often an unsafe guide" in constitutional adjudication. *Northern Securities Co. v. United States*, 193 U.S. 197, 397 (1904); *United States v. Raines*, 362 U.S. 17, 21 (1960). Despite the passage of the Pennsylvania statute, the citizens and taxpayers of the Commonwealth, through their elected representatives, retain the power and the means to deal effectively with any abuses in the form of over-reaching on the part of non-public schools which might occur in the future. Moreover, three years of operation under the statute have not

[42] Brief for Appellee Schools, pp. 47-49.

[43] Some 84 such programs are listed in Supplement B attached to the brief filed by the named school appellees in this case. The programs enacted since World War II are listed herein at n. 15, *supra*.

witnessed any emergence of the "fragmentation" and "divisiveness" about which appellants purport to be alarmed. Finally, should such disturbing tendencies manifest themselves in the future, they "can be dealt with 'while this Court sits.'" 397 U.S., at 678.

The appellants' particular concerns on this point, therefore, are merely that; they do not rise to the level of a constitutional argument sufficient to denigrate the basic, and, we believe, undisputed propositions on which this case should turn, *i.e.:* (1) that non-public schools, including those affiliated with religious institutions, perform very valuable secular educational services; (2) that it is in the interests of the citizens and taxpayers of Pennsylvania that these secular services continue to be furnished by such schools; and (3) that the statute which the Pennsylvania legislature has enacted, both in purpose and in primary effect, is aimed at insuring the continued performance of those secular educational services without any undue involvement of the State with religious affairs.

For the reasons stated above, this Court's opinion in *Walz v. Tax Commission, supra,* in no way can be construed to effect a repudiation of the *Schempp* test. Rather, it applied that test to the facts before it, reaffirmed *Board of Education v. Allen,* and thus preserved both the test and its application in *Allen* as the basis for decision in future cases, including this one. Applied here, *amici* respectfully say, it sustains the constitutionality of the Pennsylvania act.

CONCLUSION

For the reasons stated in this brief, these *amici* urge that the Court affirm the decision of the court below.

Respectfully submitted,

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FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1970.

No. 89.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,
Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOB SCHOOLS OF PHILADELPHIA,
Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF OF CITY OF PHILADELPHIA, AMICUS CURIAE.

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INTEREST OF THE AMICUS.

The City of Philadelphia, amicus curiae, is a political subdivision of the Commonwealth of Pennsylvania, being a city of the first class functioning under a Home Rule Charter, and having a population of approximately two million persons, of whom approximately 280,000 are enrolled as students in the public schools of the local, coterminous School District of Philadelphia, and approximately 160,000 are enrolled as students in local nonpublic schools.

The City of Philadelphia is interested in the welfare of all of its citizens, including all of the children who attend all of the schools, both public and nonpublic, and all of the taxpayers who support, by their taxes and by their voluntary contributions, all of these schools.

The City is of the opinion that the welfare of all of its citizens demands that every child shall be able to receive a quality secular education, and that no child shall be deprived of the opportunity for such secular education by reason of the fact that he or his parents shall have chosen to seek the same in a school other than the public schools or be forced, by financial pressures, to give up that choice in order to seek aid in the public schools.

The City is aware of the financial crisis facing elementary and secondary education, public and nonpublic, in the Philadelphia School District, in the Commonwealth of Pennsylvania and in the nation, as a result of the rapidly mounting costs occasioned by the rising school population, the pressures of inflation, and the competing demands for tax funds which arise from the ever increasing noneducational needs of the same communities.

It is particularly aware of the fact that nonpublic education is bearing the burden of educating more than 20% of the school children in the Commonwealth and more than one-third of the school children within its own borders; that, as a result of the financial crisis facing all schools today, there is a serious danger that many nonpublic schools will be forced to close their doors, with the result that many students will be forced to transfer to the already hard-pressed public schools, depriving them and their parents of

a fundamental liberty, and imposing upon the public schools and upon the taxpayers of the City an intolerable burden, both financially and in terms of quality education.

In the face of this exceedingly serious threat to the freedom of, and the quality of education available to, its people, and to the ability of the taxpayers to meet the mounting demands of the numerous problems of a metropolitan center, the City is appreciative of the efforts of the Legislature of the Commonwealth to reduce the public hazards inherent in this crisis and to provide for the continued secular education of all of the children of the Commonwealth, through the purchase of secular educational services from the non-public schools in the City and throughout the State.

It is because the City believes that the statute under attack in this case is an invaluable aid to the education in secular subjects of all of the children in all of the schools, as well as a very substantial contribution to the general economic health of the community; that it is designed to do so in a manner calculated to protect the religious freedom of the people; and that the attack launched upon the law by the appellants and others is not only ill-conceived, but will, if successful, work a great injustice and very serious hardship upon all the people of the community; that the City of Philadelphia* is submitting this brief *amicus curiae*.

THE NATURE OF THE DISPUTE.

Although the appellants and their supporting *amici curiae*, make much of the alleged error on the part of the District Court in deciding the matter on a motion to dismiss, thus depriving appellants of an opportunity to present testimony, an examination of their arguments reveals that the question before the Court was and is founded upon several conclusions of law.

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* See letter of Hon. James H. J. Tate, Mayor of Philadelphia, to Mr. William D. Valente, President, Board of Education; Archdiocese of Philadelphia, dated July 14, 1970; attached as an Addendum to this Brief.

The fundamental position of the appellants is really this: that the purchase of secular educational service provided for in the statute is not a purchase at all, but a mere subterfuge, designed to disguise a subsidy which is being made by the Commonwealth for the purpose of giving aid to religion, and particularly to one religious group, contrary to the provisions of the Establishment Clause and of the Free Exercise of Religion Clause of the First Amendment to the United States Constitution.

In order to buttress this view, appellants seek to show that the Commonwealth receives nothing of value in return for the payments made (brief, p. 10), arguing that, since the recipients of funds rendered no *additional* services "because the schools do not undertake any obligation whatsoever to educate any particular students or any additional students at all" (brief, p. 14), there is no contract. This is the same argument which was made by the dissenting judge, below. The trouble with this argument is that it assumes that there can be no contract without a mutual exchange of promises, thus ignoring the unilateral contract in which one party promises to pay the other in exchange, not for a promise, but upon the actual performance of the act.[1] Such contracts by their nature create no obligation at the inception, but involve a promise by promisor to perform something in the future provided the promisee performs a specified act. Upon performance, however, the contract matures and the original promise is capable of enforcement.

The second legal conclusion which lies at the foundation of appellants' attack is their utter inability to conceive, or at least to accept, either the possibility or the desirability of the coexistence of two purposes or goals in a sectarian institution. As they see the matter, a sectarian purpose completely overshadows any possible secular purpose that might be said to exist in such an institution. To them a church related school is not a school; it is a church, and,

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[1] See Words and Phrases, Vol. 43, pp. 465-67, Unilateral Contract, citing many instances involving such contracts.

consequently, any aid to this institution is by necessity an aid to a church.

Closely related to this conceptual difficulty is the tendency of appellants, and others of a similar mind, to consider the Establishment Clause of the First Amendment as an absolute prohibition of any accommodation on the part of the state. It is this absolutist tendency which has driven them to attack numerous arrangements whereby the State has accommodated and even encouraged religion. These arrangements, all of which have been upheld by this Court despite earnest efforts by the protagonists of "absolute separation", include released time[2]; the use of state supplied textbooks in church-related schools[3]; bus transportation at public expense for children attending church-related schools[4]; and tax exemption for church property.[5]

The present case has already produced very lengthy briefs submitted by the parties in the Court below as well as a substantially voluminous brief by the appellants filed in this Court. Doubtless the appellees will produce a similar document. Under the circumstances and in view of the press of time your *amicus* sees no necessity for it to thread its way through the long history of the various church-state decisions of this Court. As this Court declared in its most recent pronouncement on the subject:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religious Clauses, the Court's opinions reflect the limitations inherent in formulating gen-

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[2] **Zorach v. Clauson,** 343 U. S. 306 (1952).

[3] **Board of Education v. Allen,** 392 U. S. 236 (1968).

[4] **Everson v. Board of Education,** 330 U. S. 1 (1946).

[5] **Walz v. Tax Commission of the City of New York, No. 135,** October Term, 1969 (May 4, 1970), 38 L. W. 4347.

eral principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles" (*Walz*, supra, at p. 4348).

For the purposes of this brief then, the City of Philadelphia, *amicus curiae*, will confine its argument to pointing out certain errors in legal principle with particular emphasis on the question of whether or not there exists a valid secular purpose which would justify the expenditure of public funds pursuant to the statute here under attack. It will also present to the Court pertinent argument concerning the public benefits which accrue to the people of Philadelphia as a result of the statute.

SUMMARY OF ARGUMENT.

The statute under discussion is, on its face, a legitimate exercise of the legislative authority to provide for education of the children of the Commonwealth, in the face of a financial crisis which threatens to force the closing of numerous nonpublic schools presently educating more than 20% of the State's children, by supplying funds for the purchase of secular education, in the form of classes in mathematics, physical sciences, modern foreign languages and physical education, from those schools, whether they be sectarian or nonsectarian in their organization and control.

The legislative plan is not a subterfuge, designed to disguise a subsidy to religion, but a true contract providing for reimbursement for actual audited expenditures made by the schools for secular subject instruction.

The purpose of the legislature is secular in nature and this is not changed by the fact that the schools and teachers

may, and usually do, have an additional, religious, mot for providing such secular instruction.

The argument of appellants to the contrary stems fr their unwillingness to accept a reasonable balance betwe the two Religion Clauses in the Constitution, and the insistence upon an "absolute separation" of church a state.

This "absolute separation" concept is not the true mea ing of the Constitution, but rather, the test is a secular pu pose and a neutral primary effect, without excessive e tanglement of the church in the affairs of the state, a vice versa.

The Pennsylvania statute, by securing the secular legi lative purpose of education, while respecting the religiou freedom of parents who desire to send their children t religious schools, meets these tests.

The public benefits which flow from the legislative pla are enormous, not only in terms of vast financial savings fr the taxpayers, but also in terms of the protection of re ligious liberty and educational freedom, and the con comitant values of diversity and competition, and the avoid ance of a governmental monopoly in education.

And finally, the avoidance of the intolerable tax burden which would otherwise impend, will permit the continua tion and expansion of expensive but vital municipal ser vices, especially those health and welfare programs which particularly aid the poor and the disadvantaged, and which depend for their financing upon the same taxpayers wh must bear the costs of public education.

There is no charge of intentional racial segregation and such *de facto* segregation as may exist is more likely to be mitigated by the approval of the statute than by its disapproval.

ARGUMENT.

The Statute Under Discussion.

The statute[6], which has been attacked in this case as unconstitutional, was well summarized by the Court below, which referred to it as "the Education Act", in the following language:

> "The Education Act was signed into law by the Governor of Pennsylvania on June 19, 1968. The Act empowers the State Superintendent of Public Instruction to contract for the purchase of 'secular educational services' from nonpublic schools located in the Commonwealth of Pennsylvania which fulfill the compulsory school attendance requirements under Pennsylvania law.
>
> "In its legislative findings and declaration of policy the Pennsylvania Legislature has determined that a crisis exists in elementary and secondary education in Pennsylvania due to rapid increases in costs and school population and consequent demands for more teachers and facilities. It was also found that twenty per cent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's compulsory school attendance laws in nonpublic schools. It has been further recognized that elementary and secondary education constitutes a public welfare purpose and that nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of this public purpose. The Legislature, therefore, concluded that it is a governmental duty to support the achievement of this pub-

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[6] Nonpublic Elementary and Secondary Education Act, 24 P. S. §5601 et seq. (Supp. 1969). The complete text of the statute appears in Appendix A to the opinion of the Court below, 310 F. Supp. 35 at pp. 55-58.

lice welfare purpose by supporting the purely secular objectives of nonpublic education.

"Briefly, the operational scheme of the statute permits the Superintendent of Public Instruction to enter into contracts with nonpublic schools, whether sectarian or nonsectarian, for the purchase of 'secular educational services'. These 'secular educational services' are defined to mean 'providing of instruction in a secular subject', while secular subject is defined as 'any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect'. All purchases of secular educational services under the Education Act are to be at the 'actual cost' of three items of such service: teacher salaries, textbooks and instructional materials. The Education Act further limits all purchases of secular educational services to courses in mathematics, modern foreign languages, physical science, and physical education. As a condition for payment under the Act, the Superintendent of Public Instruction must approve all textbooks and instructional materials employed in the instruction rendered. In addition, a satisfactory level of student performance in standardized tests must have been attained and within five years of the date of the Act all secular educational services for which reimbursement is sought must be rendered by teachers holding State certification equal to the standard for teachers in public schools.

"Payment under the Act in discharge of the contractual obligation may be made only after service has been rendered. Section 5607(a) provides in relevant part that:

> 'Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support

of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General.'

"Funds for the operation and administration of the Education Act are to be drawn only from the nonpublic elementary and secondary education fund. The monies comprising this fund are to be taken exclusively from the proceeds of State horse racing and harness racing.

"Defendants, in their brief, have informed the Court that 1181 nonpublic elementary and secondary schools in Pennsylvania, having a total pupil population of 535,215 children, and located in 55 of Pennsylvania's 67 counties, are now under contract with the Commonwealth pursuant to the Education Act. One year's performance under contract has now been rendered, and, on September 2, 1969, the Commonwealth paid its first quarterly installment obligation."

Thus, the Act, on its face, spells out an obviously secular purpose, the primary effect of which neither advances nor hinders religion. The Court, in a two to one decision, so found.

I. APPELLANTS MISCONTRUE THE STATUTE.

Appellants, however, and the dissenting Judge, do not accept the legislative findings and declaration of purpose at face value. Instead, they purport to see in the Act a subterfuge,[7] a mere label, designed to create the impression that the state is purchasing secular educational services, when, in fact, there is no real contract, the state receives no benefit in return for its funds, and the real intention of the legislators "as revealed by the official legislative his-

[7] Brief for Appellants, p. 14.

tory, was to alleviate an alleged financial crisis of the Catholic[8] parochial school system and *thus to aid religion*". (Emphasis supplied.) The phrase "thus to aid religion" is, of course, a conclusion of the appellants, and is not contained in the legislative history, a short version of which appellants have set forth in the addendum to their brief.

A. The Legislative Purpose is to Ensure the Continuation of the Teaching of Secular Subjects in Nonpublic Schools.

There is no doubt that the legislators intended to alleviate the financial crisis in the nonpublic schools. This is clear, not only from the legislative history but is set forth quite plainly in the legislative findings in the Act itself.[9]

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[8] Brief for Appellants, p. 10.

[9] See §2 of the Act, 24 P. S. 5602 in which the Legislature found "(1) that a crisis in elementary and secondary education existed in the Nation and in the Commonwealth . . . (2) that nonpublic education . . . bears the burden of educating more than 20% of all elementary and secondary school pupils in Pennsylvania . . . (3) that elementary and secondary education is . . . a public welfare purpose [to which] nonpublic education, through providing instruction in secular subjects, makes an important contribution; that the governmental duty to support [such] purposes . . . may be in part fulfilled through . . . support of those purely secular educational objectives achieved through nonpublic education; (4) that freedom to choose nonpublic education, meeting reasonable state standards, for a child is a fundamental parental liberty and a basic right; (5) that the Commonwealth . . . [may] enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian; (6) that should a majority of parents of present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education of the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools."

It does not follow, however, that the primary purpose of the legislators was merely to alleviate a financial crisis without any reason. The whole point of the matter was that, due to the financial crisis there was a serious danger that many of these schools would close, forcing the parents to send their children in large numbers to the public schools, thus creating the "intolerable added financial burden to the public . . . as well as . . . long term . . . impairment of education", which was referred to in the Act (24 P. S. 5602(6)). It is the elimination of this hazard,[10] i.e., the danger of loss of the numerous nonpublic schools which carry such a large share of the burden of supplying secular education to the children of Pennsylvania, which constitutes the essential purpose of the Act.[11] It is hard to see how a purpose so plainly stated can justly be called a subterfuge.

B. Legislative Plan is Not a Subterfuge.

The difficulty of the appellants in this regard stems from their refusal or inability to recognize (a) that the hazard exists;[12] and (b) that the Commonwealth has, in fact, received a substantial benefit.

The essence of their position is set forth in their brief as follows:[13]

> "The majority below adopted the contention of the defendants in their brief below that under Act 109 there was a '*quid pro quo* exchange, pursuant to contract . . .' The majority accepted the facade of the face of the Act that what the statute authorized was for

[10] See discussion infra at p. 12, et seq.

[11] Ibid.

[12] Appellants, in their memorandum of law below, deny that there is in fact any trend toward the closing of nonpublic schools. But see discussion infra at p. 28, et seq.

[13] Brief for Appellants, p. 31.

'the Superintendent of Public Instruction to enter into contracts.' They speak of the payment made to the schools under Act 109 as being 'in discharge of contractual obligations,' which 'may be made only after the service has been rendered' (App. A82). Chief Judge Hastie's dissenting opinion rejected this conclusion of fact and found that there was no 'contract' in any proper sense of the word since the schools were not obligating themselves 'to do anything for or in the interest of the state.' The state buys no services and the school sells none. The artificial characterization of this procedure as 'contracting for secular educational services' does not help our constitutional problem" (App. A102).

"What the dissenting judge rightly perceived from the face of the Act appellants offered to prove as a matter of fact, after discovery, i.e., that the Commonwealth of Pennsylvania, which paid the schools, commencing in September, 1969, for 'educational services rendered in the preceding academic year', in fact received nothing. Appellants offered to prove that no children were being educated by the recipient schools that had not been previously educated by them prior to the subsidy; that indeed there was no change in the educational status quo whatsoever except for the transfer of a sum of money from the state to the nonpublic schools."

It is clear from the language quoted above that appellants and the dissenting judge are overlooking or ignoring the fact that the object to be achieved, and the consideration for the Commonwealth's agreement to pay, is not a change in the *status quo,* but rather a prevention of a change which, if it were to occur, would wreak serious damage to the education of many of the students, in both public and nonpublic schools, in the Commonwealth. This is the secular legislative purpose as well as the primary effect of the Act. When the appellants argue that the object of the Act is

to aid the nonpublic schools, they have no real quarrel with supporters of the Act. The dispute arises concerning the *reason* for the aid, that is, whether it is to achieve a secular purpose by enabling the institutions to continue[14] to provide education in the secular subjects, or whether it is merely to aid religion. The Pennsylvania Legislature has declared it to be the former and the majority of the Court below accepted the *bona fides* of that declaration. A contrary finding should be grounded upon something more substantial than the mere reasoning process indulged in by the appellants. The alleged subterfuge is in fact a statement in plain language without any effort to deceive. Indeed, though the appellants find the majority of the Court below ingenuous[15] for thus accepting the legislative findings at face value, nothing in their argument gives any substance to the charge of subterfuge.

C. Statutory Payments are Not a Subsidy for Unrestricted Use of Schools—But Reimbursement for Actual Cost of Specified Secular Subjects.

Having reached the conclusion that no contract existed and that the state had received nothing of value in return for its funds, appellants naturally concluded that the pay-

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[14] In addition to their argument that schools do not agree to provide any additional service, counsel for the **amici curiae** also argue that the state had no need to purchase the service since it could compel schools to render this service as a matter of law. (See the brief of **amici curiae**, p. 12.) This, however, is not correct since the power of the State to impose such requirements is merely the power to set forth the conditions which must be present in order that attendance at a given school may be held to be sufficient to satisfy the state's compulsory attendance laws. (See **Board of Education v. Allen**, supra, at pp. 245, 246.) There is, of course, no power in the states to compel private schools to remain open, particularly where financial difficulties render such a course impossible.

[15] Brief for appellants, p. 28.

ments authorized by the Act amounted to a simple subsi
and thus argued that

> "Any such payment from the Treasurer of the Com
> monwealth to the treasuries of sectarian church-affil
> ated schools for their unrestricted use was a violation
> of the establishment clause, per se, under the rule of
> *Everson v. Board of Education,* 330 U. S. 1 (1946), for
> bidding any tax aid 'to support any religious activities
> or institutions'."[16]

The funds, however, are not in support of any religious ac
tivities nor do they amount to support of the institution
being merely reimbursement for sums actually spent for the
secular education and restricted to that purpose by the
terms of the statute including the provision for audit by
the Commonwealth.

It is the sectarian nature of the institutions "controlled by
churches, having as their purpose the teaching and propaga
tion of a particular religious faith, and conducting their
operations, curriculums and progress to fulfill that pur
pose",[17] which, in the view of appellants and the *amici*, is
fatal to the statutory scheme. As they see it, all activities
of such institutions are religious and consequently all such
activities are beyond the power of the state to finance. As
the *amici* said,[18]

> "We find it difficult to believe that no matter what
> test for constitutionality under the Establishment
> Clause is applied, a statute which allows public funds
> to be used to finance even secular instruction *in such*
> *institutions* can be upheld." (Emphasis supplied.)

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[16] Appellants' brief, p. 9.

[17] Brief for appellants, p. 8; Brief of **amici curiae,** p. 9.

[18] Brief, p. 9.

D. Purpose of Religious Organizations Distinguished from Purpose of Legislators.

The point here is that the opponents of the statute make no distinction between the purpose of the religious organizations which operate the schools and the purpose of the legislators in enacting the statute. Although the primary purpose of the Commonwealth is secular, the primary motive which moves members of the religious organizations to undertake this secular activity may be, and ordinarily is, religious. The same dilemma faced the appellants in *Allen* where this Court declared:

> "The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However, *this Court has long recognized that religious schools pursue two goals, religious instruction and secular education* (citing *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) . . . a premise of this *(Pierce)* holding was the view that the *State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training* in the schools maintained by the Society of Sisters."[19] (Emphasis supplied.)

It is submitted that the present statutory scheme provides for true contracts for the purchase, at cost, of secular educational services, and that neither the legislative purpose nor the primary effect is to advance or to hinder religion.

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[19] **Allen**, supra, at p. 245.

II. APPELLANTS MISUNDERSTAND THE FIRST AMENDMENT.

The deep suspicion with which the appellants view the declared intention of the Legislature concerning their purpose is grounded not upon any showing of deceit on the part of the solons,[20] but rather upon a misapprehension on the part of the appellants with respect to the principles of law which govern this case, and particularly the meaning of the Religion Clauses in the First Amendment to the United States Constitution.

A. The Constitution Does Not Require Absolute Separation —Religious and Secular Purposes Can Coexist.

To put the matter concisely, the appellants believe in a fundamental principle of "absolute separation"[21]; which leaves no room for that accommodation which this Court found to be "the common sense of the matter".[22]

> "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency, one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly . . . We are a religious people whose institutions presuppose a Supreme Being . . . when the state encourages religious instruction or

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[20] Although, there having been no trial below, no evidence was submitted, nevertheless, appellants argue that their proof lies in the legislative history (brief, p. 10). An examination of that history, however (appendix to appellants' brief), reveals nothing to indicate subterfuge or deceit. See discussion, supra.

[21] Brief for Appellants, p. 41, footnote 17.

[22] **Zorach v. Clauson,** supra, at pp. 312-314.

cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. We would be preferring those who believe in no religion over those who do believe."

The above language has been cited with approval by this Court on several occasions, the latest being in the very recent case of *Walz v. Tax Commission,* supra, where this Court said:

"The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." [citing Zorach, as above.][23]

Those who cling to the absolute, however, find it difficult to conceive of the possibility, or at least of the desirability of recognizing, that a church-related school might have, not one purpose, a religious one, but rather two purposes, the one religious and the other secular.[24] To the absolute separationist, the two are one and the one is religious.

In *Allen,* supra, this Court rejected this rigid approach and upheld a New York law which made textbooks available to pupils in parochial schools. In so doing this Court cited both *Pierce,* supra, and *Cochran v. Louisiana State Board of Education*[25] as examples of cases upholding the reliance upon church-related schools to provide secular aspects of education in which the state had an interest. Thus, referring to *Pierce,* supra, this Court said:

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[23] 38 L. W. 4347, at 4348.

[24] **Board of Education v. Allen,** supra, at p. 245.

[25] 281 U. S. 370 (1930).

> "Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters."[26]

Indeed, this Court recognized that under *Pierce* the state not only could but "must" satisfy its interest in secular education through the instrument of private schools. Referring to numerous cases upholding a state's authority to create reasonable standards for education in such institutions, this Court said:

> "These cases were a sensible corollary of *Pierce v. Society of Sisters*: if the state must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular education function."[27]

The Court then went on to refer to *Cochran*, supra, as another corollary, in which the supplying of school books by the state to children in both public and private schools was upheld as a public purpose. The *Allen* Court then set forth the underlying principle which justifies encouragement by the State of private school systems including the church-related ones, in the following language:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind

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[26] **Allen**, supra, p. 245.

[27] **Ibid**, p. 247.

of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."[28]

In the matter at bar a wide segment of public opinion in the Commonwealth of Pennsylvania, legislative and otherwise, as reflected in the Act of 1968, has found that the nonpublic schools do an acceptable job of providing secular education to their students. There appears to be no reason why, if the state may rely upon these schools to perform the secular function, the state cannot provide the necessary funds to see that the secular function will be continued.

The idea that state payments in reimbursement of costs incurred by a sectarian institution to provide welfare services to children, are not subsidies in support of religion, but payment of just debts, was recognized in *Schade v. Allegheny County Institution District*[29], where the Pennsylvania Supreme Court upheld payments to a Baptist orphanage for the support of delinquent children, against attacks founded, inter alia, on the Establishment Clause. Citing *Everson* and *Cochran*, supra, the Court said:

"The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors. The services had been rendered before partial payment on account of same was received. A considerable part

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[28] Ibid. pp. 247-48.

[29] 386 Pa. 507 (1956).

of this money is recouped by the Juvenile Court from the parents of these minor wards. The balance of the funds so expended are, in legal effect, payments to the child,—— not the institution supporting and maintaining him or her. [case cited] . . .

"The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval. Numerous cases can be readily visualized where such situations have occurred: i.e., payment of the bill of an injured employee to a sectarian hospital."[30]

This Court had reason, even more recently than in *Allen*, to reiterate the appropriate general principle applicable to church-state questions when it declined, in *Walz v. Tax Commission*, supra, to strike down property tax exemptions enjoyed by religious organizations for religious properties, which exemptions were attacked as violative of the First Amendment. In delivering the opinion of the Court, Mr. Chief Justice Burger discussed the Establishment and Free Exercise clauses of the First Amendment warning against the danger of "too sweeping utterances" and the rigidity which "could well defeat the basic purpose of these provisions":

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist

[30] **Ibid.** at p. 512.

without sponsorship and without interference.

"Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."[31]

It is submitted that the instant legislative program is a prime example of benevolent neutrality, without sponsorship and without interference, by means of which the State seeks to provide for a valid secular educational purpose by relying upon nonpublic institutions, whether church-oriented or otherwise, and at the same time permitting and assisting the parents of the children to continue to exercise their religious freedom in the choice of schools. It is precisely the sort of "accommodation of the Establishment and Free Exercise Clauses" which will prevent "the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."

B. The Statute Does Not Create Excessive Involvement of Church and State.

Appellants, in their brief,[32] suggest that the purchase of secular education by the state from church-related schools creates the "excessive involvement" which was mentioned by the Court in *Walz*. However, if there is to be an accommodation, a balancing of the Religion Clauses, some in-

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[31] **Walz**, supra, p. 4348.

[32] Brief for Appellants, pp. 43, 44.

volvement is inevitable. The key word is "excessive". In the instant matter the state involvement is merely that supervision, including auditing, which is reasonably necessary to ensure that the service to be paid for has, in fact, been rendered. Since that service is the instruction of students in secular subjects, a matter in which the state already has the right to impose and enforce standards,[33] it can hardly be argued that payment for the secular service somehow enhances this necessary involvement to an excessive degree. The evil to be avoided is not payment for value received, but involvement; and the involvement, to be improper, must be excessive.

Appellants point to one provision of the statute which they deem "potentially ominous from this standpoint."[34] They refer to Sec. 5603(3) which reads as follows:

> " 'Secular subject' shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The clause is a definition of "secular subjects" and describes just what it is that is being purchased by the Commonwealth. It makes clear that the Commonwealth is interested in securing instruction in secular matters, and not in religious and moral matters, which are properly the concern of others. Of course, it would be improper for teachers, under the pretext of teaching mathematics, science or lan-

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[33] **Allen,** supra, at pp. 245, 246. "Since **Pierce,** a substantial body of case law, has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction (cases cited). . . . These cases were a sensible corollary of **Pierce v. Society of Sisters:** if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

[34] Brief for Appellants, pp. 43, 44.

guage to substitute a course in religion or morals; and the state has the right to expect that this shall not be done; but to suggest, as do the appellants, that this requires the state to "police the classrooms" or to employ "undercover student agents",[35] is to indulge in a process of exaggeration which hardly befits a legislature bent upon reasonable accommodation of the secular needs and the spiritual needs of the students and their teachers. Whether or not abuses on the part of teachers will arise from time to time in the future, and what, in such event, the administrators of the Act might deem to be appropriate measures to deal with such cases, remain to be seen. Surely it is not necessary for this Court to assume that such abuses are inevitable or that the state would exceed the bounds[36] of reason in taking corrective measures. At any rate, should abuses occur, the state can decline to make payments, and, on the other hand, should state regulations be deemed excessive, the teachers or other persons affected may appeal to the Courts for an appropriate remedy.

A closely related idea, often asserted by this Court, is the principle that the state may not condition the distribution of welfare benefits upon the surrender of constitutional rights.[37] This concept, which lies at the heart of the Court's doctrine of "benevolent neutrality",[38] has never been acceptable to proponents of the "hostile and even unfriendly"

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[35] **Ibid.**, p. 44.

[36] Cf. **NAACP v. Alabama**, 377 U. S. 288 (1964), where the Court declared "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". And see **Sherbert v. Verner**, 374 U. S. 398 (1963). See also **Griswold v. Connecticut**, 381 U. S. 479 (1965).

[37] See **Sherbert v. Verner**, supra; **Torcaso v. Watkins**, 367 U. S. 488 (1961); and **Frost v. Railroad Commission**, 271 U. S. 583 (1926).

[38] **Walz**, supra, at p. 4348.

theory of absolute separation. Nevertheless, this Court, while often permitting secondary effects which *advance* religion, has insisted that *inhibitions* of religion are forbidden unless they are essential to the accomplishment of a valid legislative purpose.

In the matter at hand, the state, in furtherance of the secular education of youth, may impose reasonable standards, and may guard against abuses by over-zealous religious teachers by appropriate regulations. But regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

At this stage, however, when the question before the Court is the constitutionality of a statute, and not the question of abuse by either church or state in the application thereof, there is no need for judicial anticipation of problems which might arise in the future. Although the usual presumption in favor of the validity of legislative enactments will not prevent this Court from carefully scanning a statute alleged to affect vital freedoms, nevertheless, the legislative findings are not to be lightly set aside.[39] The scanning should be careful, but not hostile.

We are faced, in the matter of education, with an area of life in which the welfare of children requires the cooperation of three authorities: parents, state and church, each of which is vitally concerned, but none of which claims exclusive jurisdiction. Either they will coexist in peace and mutual respect, each performing its own role in the joint undertaking, or they will struggle for dominance. It is reasonable cooperation, not "absolute separation", which can and will result in mutual respect and peace. This is the common sense of the matter.

It is submitted that the Act of 1968, on its face, provides for reasonable standards of regulation, and does not create an excessive involvement of church and state in the proper affairs of the other.

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[39] Opinion of the Court below. 310 F. Supp. 35, at p. 45.

III. THE PUBLIC BENEFIT TO BE ACHIEVED.

Although the case at bar was disposed of on a Motion to Dismiss, and, consequently, no factual record was developed, nevertheless, the appellants, in their argument to this Court, have laid considerable stress upon certain allegations of fact, statistical and otherwise, mainly in an effort to bolster the idea that there is no public benefit to be achieved through the expenditure of public funds under the statute. *Ergo*, they reason, there being no secular legislative purpose, the payments are an illegal subsidy in support of religious purposes.

The Commonwealth, on the other hand, has indicated in the legislative findings,[40] that a very valuable benefit will accrue to the public in that the payments authorized in the statute will

—help to meet the financial crisis in elementary and secondary education, by

—helping the nonpublic schools to continue to bear a very large share (more than 20%) of the burden of educating the children of Pennsylvania,

—at a cost in public funds far less than that cost would be were the nonpublic schools, or a substantial portion of them, to cease to operate;

—and this will be done in a manner which will

—encourage the freedom of parents to choose their children's schools;

—prevent the chaos and impairment of education in the public schools which would result should the public schools be called upon to assume the intolerable added financial burden which the demise of nonpublic education would create.

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[40] 24 P. S. 5602.

The City of Philadelphia, your amicus, is particularly sensitive to these public benefits because such a large portion of that burden is borne by the nonpublic schools within its borders.

A. The Savings to the Taxpayers.

(1) *In Pennsylvania*

The fact and the size of this public benefit was recognized by the Supreme Court of Pennsylvania in a recent case[41] involving an attack upon the state legislation authorizing publicly funded busing for children attending nonpublic schools. The Court rejected the attack, which was similar to appellants' argument in the instant case, and upheld the law. In the course of its opinion the Court said:

> "The huge budgets required to maintain our public school system is a matter of concern to everybody. The imperative need for the best in education for the youth of our Commonwealth convinces the civic-minded citizens of the inevitability of heavy taxes to meet the expense, but it does not lessen the weight of the financial burden he must carry. Therefore, any procedure which may lighten that burden, consistent with maintaining the highest State educational standards, is warmly welcomed by the taxpayers. Thus, for every nonpublic school pupil picked up on the road by a public school bus, that much weight is lifted from the back of the taxpayer because the maintenance of nonpublic schools, of course, does not depend upon public funds."[42]

It is equally true that every child who receives instruction in the secular subjects covered by the statute, in a non-

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[41] **Rhoades v. Abington Township School District,** 424 Pa. 202 (1967).

[42] **Ibid,** p. 209.

public school, is thereby enabled to remain there for the entire curriculum, and the weight of the cost of that curriculum is lifted from the back of the taxpayer, since the reimbursable portion of the cost of those four subjects is but a small fraction of the total cost of educating a child in the public schools.

The Pennsylvania Court went on to indicate the size of the benefit:

> "Nearly one-fourth of the school children in Pennsylvania attend nonpublic (mostly denominational) schools. Since the parents of the children in nonpublic schools still pay public school taxes, without using public school facilities, it has been estimated that the taxpayers, since they are not required to provide teachers, equipment and supplies for the nonpublic schools children, are financially benefited to an amount equal to one-third of the entire educational budget of the Commonwealth.[43] Indeed, if nonpublic schools were to be abolished, the increase in tax burden to the citizens of the Commonwealth would be noteworthy and the Commonwealth would be hard put to provide the buildings, teachers and equipment for the flood of additional children released into their care and responsibility."[44]

(2) *In the Nation*

The same recognition of the substantial public benefit flowing from the continued existence of nonpublic schools is

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[43] General Fund Budget Message of Governor William W. Scranton, February 7, 1966 (b) 1966-1967 Budget of the Commonwealth of Pennsylvania, (c) "Current Expenditure Per Pupil, Average Daily Membership for Selected States", 1965-1966, Table 17, p. 20, Vol. 4, Selected Educational Statistics, Bureau of Statistics, Department of Public Instruction, Commonwealth of Pennsylvania (1966).

[44] **Rhoades,** supra, p. 210.

reflected in the recent Message to the Congress from President Richard M. Nixon, on March 3, 1970:[45]

> "Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.
>
> *"If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."*

Whereas, the proportion of the burden borne by nonpublic schools across the nation is 11%, the public share in Pennsylvania is more than 20%, and the proportion in Philadelphia and in many other urban and metropolitan areas is far higher.

A statistical analysis prepared by the Legal Department of the National Catholic Welfare Conference[46] sets forth the elementary and secondary school enrollment in the United States in 1960, by states, together with the number and ratio in the Catholic schools. The study indicated that an additional, non-Catholic, portion of the nonpublic school enrollment amounted to 10% of the Catholic figure. A few of the more significant figures are as follows:

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[45] Education Reform: The President's Message to the Congress Proposing a Series of Actions to Improve Elementary and Secondary Education. March 3, 1970; from Weekly Compilation of Presidential Documents, Vol. 6, No. 10, Monday, March 9, 1970, at p. 312.

[46] Georgetown Law Journal, Vol. 5, No. 2, Winter, 1961, p. 399, at pp. 443-4.

State	Total Enrollment	Catholic	Catholic ratio
Connecticut	573,331	84,416	14.72%
Delaware	102,604	18,544	18.04%
Illinois	2,274,666	484,506	21.30%
Massachusetts	1,072,240	234,414	21.90%
Minnesota	850,684	143,953	16.92%
New Hampshire	137,758	28,899	20.98%
New Jersey	1,370,894	287,717	20.99%
New York	3,606,894	751,722	20.84%
Ohio	2,349,326	362,249	15.42%
Pennsylvania	2,569,738	562,861	21.90%
Rhode Island	187,674	48,328	25.75%
Wisconsin	975,455	227,686	23.34%
United States	42,099,576	5,287,230	12.56%

By increasing the last two figures by 10% we find the estimated number of students in all nonpublic schools in 1960 was about 5,815,953 or 13.81% of the total. This compares to President Nixon's figures (supra) for 1970 of close to 6,000,000 or 11% and it is seen that the nonpublic share of the educational burden across the nation is substantial, but declining in proportion to the total.

(3) *In the Cities*

The concentration, in large urban areas, of persons preferring nonpublic schools has resulted in percentages far in excess of the national average.

Thus, the New York-Newark-Jersey City Standard Metropolitan Statistical Area (SMSA), in 1960, had 28% of its students in nonpublic schools; Chicago-Gary 32%; Philadelphia 34%; Detroit 21%; Boston 23%; Pittsburgh and St. Louis 29% each; Cleveland 29%; Minneapolis-St. Paul 27%; Cincinnatti and New Orleans 33% each; Milwaukee 37%.

Some of the smaller SMSA's had even higher percentages

of nonpublic school enrollment: Dubuque 69%; Green Bay 55%; Lewiston, Me. 51%; and Manchester, N. H. 49%.[47]

The problem facing Pennsylvania in the face of the threat of closing nonpublic schools is seen, then, to be a part of the national picture, and Philadelphia, with its high proportion of such schools is one of many large cities in the same boat. It is this situation, in which a large portion of the burden of educating the children of the Commonwealth is carried by nonpublic schools now threatened with closing due to financial pressures, which moved the Pennsylvania Legislature to enact the statute here under consideration.

(4) *In Philadelphia*

In Philadelphia, the nonpublic schools enroll 160,000 students, as compared to 280,000 in the public schools.[48] This is approximately 36% of the total school population, and represents 57% of the public school enrollment.

The mutual dependence of these two great systems, and the serious effect that financial failure of either would have upon the other, was expressed in a joint statement issued by the principal officers of the two systems on November 24, 1969, as follows:

> "The critical needs of all of Philadelphia's children have brought the Philadelphia Board of Education and the Archdiocesan Board of Education to a clear realiza-

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[47] The above figures are taken from the U. S. Bureau of the Census, 1960, Vol. 1, U. S. Summary, Part 1, as reported in an article by Robert J. Havighurst, "Social Functions of Catholic Education", a portion of a symposium entitled Catholic Education Today and Tomorrow, Nov. 1967, ed. Michael P. Sheridan, S. J. and Russell Shaw, National Catholic Education Assn., Wash., D. C., at pp. 10-11.

[48] See testimony of Dep. Superintendent of Schools Horowitz reported in Legislative History (Appellants' Brief, Addendum, p. 5 add). And see the Bulletin Almanac, 1970, p. 381, where the figures are: public schools 279,847; nonpublic (parochial 143,945 and private 15,674) a total of 159,619.

tion of the necessity to work for the joint solution of their common problems. The education of the children of Philadelphia depends upon the strength of two great educational systems—the public school system and the parochial school system. Each is essential to the welfare of the city and its children; each is fundamentally dependent upon the other. If one suffers, the other inevitably suffers.

"Both school systems face severe financial crises which will intensify in the days ahead. The financial failure of either system would seriously endanger the financial stability of the other, and this prospect must be avoided. The Archdiocesan Board of Education recognizes specifically the need for the Catholic community to be committed wholeheartedly to the financial support of public education. In turn, the Philadelphia Board of Education recognizes the need for governmental aid for the secular education of children in nonpublic schools.

"Is is, therefore, essential that the two systems work in close harmony, not only in the field of education, but also in the solution of their respective financial problems. To these ends, the two boards have agreed to work jointly to secure the city, state, and federal funding necessary to provide essential educational services for all the children of Philadelphia.

"To achieve these objectives, a joint committee of the two boards has been established."[48a]

If the nonpublic schools were to close, for financial or any other reasons, the burden placed on the public schools would be increased as much as 57%. In its current proposed operating budget for the school year commencing in

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[48a] Joint statement by Richardson Dilworth, President, Board (Philadelphia) of Education; William D. Valente, President, Archdiocesan Board of Education; Rt. Rev. Msgr. Edward T. Hughes, Superintendent, Archdiocesan Schools; Dr. Mark R. Shedd, Superintendent, Philadelphia Public Schools. November 24, 1969.

September, 1970, the Philadelphia School District proposes to spend for operating purposes (capital needs are not included) the sum of $314,115,000.[49] A 57% increase in this amount would result in an additional burden on the taxpayers in a sum in excess of 179 million dollars. This is the operating cost for one year and does not include capital expenditures which would be required to provide school buildings and other capital needs. What these would amount to is unknown. Their immensity, however, is suggested by the President's Message to the Congress, supra, in which President Nixon reported that, in the event of the loss of the nonpublic schools of the nation, the resulting capital cost would be in excess of the annual operating costs. (Five billion, as compared to four billion dollars.)

A report of the Pennsylvania Department of Education dated May, 1970, indicated payments made pursuant to the Act, during 1969-70, covering services rendered in the first year covered (1968-9), in a total amount of $4,875,534, paid to 1178 schools. Philadelphia's share, for 173 schools, was $1,058,473. Payments for the first year covered only 31% of actual claims, due to the limited funds available.

In a subsequent report, dated July, 1970, the Department indicated that it expected to pay for the second covered year (1969-70), for 1141 schools, a total sum of $19,480,015. Philadelphia's share, for 171 schools, was estimated at $4,115,978.

The comparative figures then are these: cost of educating 160,000 additional students transferring from nonpublic to public schools in Philadelphia, $179 million (*plus* capital expenditures); cost of preventing the transfer by purchase of services of nonpublic schools, $4.1 million dollars.

In the face of these figures, it is difficult to credit the opinion of one State official, cited by appellants in their brief,[50] to the effect that the Philadelphia public schools

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[49] Proposed Operating Budget of the School District of Philadelphia, Fiscal year beginning July 1, 1970, p. 1.

[50] Comment of Dr. B. Anton Hess, Commissioner of Basic Education, reported in Addendum to Appellants' Brief, p. 3 add.

could absorb the nonpublic school students "next September". The official stated that all such students "could be taught math, sciences and languages" by the public schools, but neglected to notice that closing of the nonpublic schools would impose, not merely the duty to teach those three subjects, but the burden of the entire secular curriculum; i.e., 179 million dollars, exclusive of capital expenditures!

Lest it be imagined that capital expenditures would be minimal due to the existence of unused space in the public schools, we call the Court's attention to the following excerpts from the School District Capital Budget:

"Further delay in the alleviation of acute overcrowding would be intolerable; . . .

"In the opinion of the staff, the Proposed Capital Budget and Program represents the absolute minimum level of expenditures necessary to provide the children of Philadelphia with a reasonably safe, functional and uncrowded environment for learning within this decade . . .

"Total enrollment (including preschool) still exceeds the total optimum capacity of existing permanent facilities by almost 30 percent. Half of the elementary schools and 70 percent of the secondary schools in Philadelphia are overcrowded now; enrollment in kindergarten through twelfth grade is expected to increase by nearly 30,000 students over the next ten years . . .

"The best that can be attempted in the current Program is to ameliorate the most desperate overcrowding according to a fair system of priorities. Thus while the long-range Plan for School Facilities requires the construction of 13 new high schools, 31 new middle schools, 34 new lower schools, and 26 school additions, only 65 of these 104 needed projects are funded in this Capital Program.

"Since the full need for school space cannot be met in permanent facilities for many years, several interim steps have been taken to obtain additional space, to use existing space more efficiently, and to mitigate the

effects of crowding in existing schools. These include the purchase and rental of school annexes; the program of busing-for-overcrowding at the elementary level, and the use of staggered-shift or 'dual-school' schedules in secondary schools . . ."[51]

If the present proposed capital budget represents the "absolute minimum", while "the best that can be attempted . . . is to ameliorate the most desperate overcrowding", and the full needs "cannot be met for many years"—the immense increase in both capital and operating expenses which would be precipitated by the closing of the nonpublic schools would be a catastrophe.

All of this heavy tax burden is in addition to the heavy cost of municipal services, including vast expenditures for health, welfare and police measures, which are essential to the survival of decent living conditions in metropolitan areas.

The taxing jurisdictions of the School District of Philadelphia and the City of Philadelphia municipal government are coterminous. Consequently both taxing authorities must rely on the same tax base for local tax revenues. The costs to provide municipal services have been increasing annually at a rate greater than the rate of increase in the revenues available to the City of Philadelphia. As a result, periodic increases in local taxes have been necessary. Projections of cost and revenue curves indicate that the revenue gap will continually widen and that the City of Philadelphia will have to impose tax increases with some degree of regularity. The imposition of a substantial tax increase by the School District of Philadelphia would drastically impair the ability of the City of Philadelphia to increase taxes to finance the provision of the municipal services for which it is responsible.

In view of the above, the legislative finding, that the removal of the nonpublic school children to the public

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[51] The School District of Philadelphia Proposed Capital Budget and Program—1971-1976, at pp. ii, iv and v.

schools would result in "an intolerable added financial burden to the public . . . as well as school stoppages and long term derangement and impairment of education in Pennsylvania"[52] is an understatement.

If this hazard can be substantially reduced by the expenditure of a tiny fraction of the sums which would otherwise be needed, the benefit to the public is so obvious that he who runs may read; and the suggestion of appellants that there is no public benefit to be realized, and consequently no secular legislative purpose to be achieved, from the expenditure of funds authorized by the statute, is untenable.

B. Freedom in Education—A Public Benefit.

In addition to the immense financial benefit to the public described above, the statute before the Court, if it is successful in its efforts to help the nonpublic schools avoid closing, will produce another public benefit, one of inestimable value to the community, though not capable of measurement in monetary terms. It will help to preserve freedom in the vital area of education.

The statute declares, in its legislative findings,

> "That freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;"[53]

and this Court has expressed the same thought in the leading case of *Pierce v. Society of Sisters*, supra, when, in a unanimous decision, the Oregon statute which would have compelled attendance at public schools was struck down. In the words of the Court:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any gen-

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[52] Act of 1968, June 19, P. L. , No. 109, sec. 2(6); 24 P. S. 5602(6).

[53] Act of 1968, supra, at section 5602(4).

> eral power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[54]

This parental right is an important part of the inalienable right to liberty, with which all men are endowed by their Creator, and the protection of which constitutes the very reason for the existence of government. In the words of the Declaration:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that amongst these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men . . ."[55]

This is the cornerstone, in American law, upon which is founded the concept of benevolent neutrality, as opposed to absolute separation, which this Court has recognized as[56] the object to be achieved in the balancing of the sometimes conflicting demands of the two religion clauses in the First Amendment to the Constitution.

Whenever the state acts to protect the religious liberty of its citizens, the necessary, indeed, the desired, purpose is, not to make judgments concerning the respective merits of various religious doctrines or practices, but to permit the citizens to make such judgments; and to permit each citizen to act in accordance with his conscience, not with the guidance of the state, but aided by that liberty which it is the business of the state to protect.

Among the rights which constitute the broad idea of liberty, few are more precious,—to a parent, perhaps none

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[54] **Pierce,** supra, at p. 534, and see **Allen,** supra, where the Court reiterated the **Pierce** doctrine.

[55] Declaration of Independence, July 4, 1776, 1 Stat. 1.

[56] **Walz,** supra, at p. 4348.

are more precious—than the right to choose the teachers to whom he will entrust the formal education of his child.

There can be no more appropriate legislative purpose than the securing of the rights of the people; in its efforts to protect freedom to choose nonpublic education, the Pennsylvania legislature has served an eminently proper public purpose.

In addition to the fundamental protection of freedom, there are certain corollaries, which bring additional benefits to the public. These include the avoidance of monopoly and the preservation and encouragement of competition and diversity in education.

In a recent report entitled "The Disadvantaged Poor: Education and Employment",[57] the United States Chamber of Commerce Task Force on Economic Growth and Opportunity recommended government financial support for the education of all children, including support for private education as an alternative to public education. The Task Force based its recommendation upon the values of parental freedom of choice, the avoidance of governmental monopoly and the value of diversity and competition. Putting forth "the notion that government should not have a monopoly on publicly financed schooling", the Report said:

> "Lack of competition eliminates (the) ceaseless pressure for progress. And as a result, public schools are less vigorous than they could be.
>
> The second observation in support of our conclusion is based on the virtues of diversity. It is our conviction that no single collection of men, however competent and however dedicated, can exhaust the worthwhile possibilities in a given subject matter. Diverse groups, each pursuing institutional or personal self-interest or even selflessly working in a variety of intellectual climates, are more likely to produce divergent ideas than

[57] "The Disadvantaged Poor: Education and Employment" (1966); U. S. Chamber of Commerce Task Force on Economic Growth and Opportunity; U. S. Chamber of Commerce Catalogue No. 66-29037, pp. 63-69.

any monolith, no matter how tolerant. We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial marketplace. Why should we settle for the single choice in education?

And finally, a strong bias in favor of free choice and maximum satisfaction of individual preferences underlies our conclusion. As an intrinsic matter, we think it desirable that parents should have a choice of schools for their children. Educational philosophies differ. Different schools, none of them perfect, will have different combinations of strengths and weaknesses. Parents should be able to choose among them—Americans take their freedom for granted in planning college or university educations; relatively well-off Americans and members of some religious groups exercise the same choice for their children at the secondary-school level and sometimes before. Why should we settle for less for the great majority of Americans at the primary and secondary levels?"

The same regard for freedom, and its corollaries of competition and diversity, was reflected in the remarks of President Nixon in his report to the Congress[58] on the occasion of his establishment of the President's Commission on School Finance:

"The nonpublic elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment-supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education

[58] Report to Congress, March 3, 1970, op. cit., at p. 312.

> of our children, the absence of competition would neither be good for that school system nor good for the country. The nonpublic schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

And, referring to the spiritual dimension often added by non-public schools, the President declared: "The government cannot be indifferent to the potential collapse of such schools." He then made the problem of the parochial schools a particular assignment of the Commission, and said:

> "In its deliberations I urge the Commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that nonpublic schools in America are closing at the rate of one a day."

It is submitted that the encouragement of freedom in education, with its concomitant values of competition and diversity, constitute a valid secular legislative purpose, and a benefit to the public of immense value. Standing alone, even without the tremendous financial saving to the taxpayer discussed *supra*, it would more than adequately justify the expenditures authorized by the Act of 1968.

C. The Program Will Aid the Cause of Racial Justice.

Appellants, in their many-pronged attack upon the Act, have thrown in the charge of racial segregation.[59] They do not allege any intention on the part of the nonpublic schools to exclude members of the negro race (Brief, p. 51) but

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[59] Standing to sue with respect to 14th Amendment charges was rejected by the court below, including the dissenting judge.

cite *de facto* segregation (Brief, pp. 8, 11) and then predict that a growth in nonpublic schools will result in two publicly supported systems, one poor and black, the other rich and white (Brief, pp. 9, 51).

It is interesting to note that, despite generally declining enrollment, the number of negro students in the Catholic schools of Philadelphia has increased during the past three years, and this despite the historical fact that the overwhelming majority of negroes in America have been Protestants.[60]

Appellants' argument is a peculiar one, for reason would suggest the opposite effect—not segregation, but integration, may be expected in the event nonpublic schools are not forced out of existence by economic pressures. *De jure* segregation springs from law or regulation, from the will of the rule giver. Whether he be an official of government or of an institution, it is his will which denies freedom and equality to persons by reason of race. *De jure* segregation should be struck down by contrary rules, enforced, where appropriate, by government, and by this Court. There is none here. *De facto* segregation springs from factors other than the will—primarily economic deprivation. It can be cured by measures which remove that deprivation. For, it is fundamental that scarcity produces higher cost, and cost reduces the power to choose, beginning with him who has the least. If the nonpublic schools are forced to close (and the trend is ominous), fewer parents will be able to exercise that precious freedom, so firmly vindicated by this Court in *Pierce;* tuitions, where they exist, will increase, and where they do not exist will be created; and in this choice, as in every choice which depends on cost, the poor will be the first to lose their freedom.

On the other hand, the preservation of freedom in education will enable more and more of the poor and the black (often the same persons) to choose the kind of schools

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[60] The Office of the Archdiocesan Superintendent of Schools reports negro enrollment in Catholic schools in Philadelphia as 1967: 15,099; 1968: 15,199; and 1969: 15,443.

which they prefer, but, which, in the absence of low cost nonpublic schools, they cannot afford. In this regard, it should be noted that both the Chamber of Commerce and President Nixon, in their reports discussed *supra*, considered the preservation of nonpublic schools as an advantage, *especially* to the poor and disadvantaged.

In addition, the avoidance of the intolerable tax burden which would strike the communities, especially the large metropolitan areas, will go far to permit the continuation of costly municipal programs of health and welfare whose principal beneficiaries are the poor and disadvantaged.

Absolute separation is a move towards state monopoly control over the education of all but the few whose purses are fat enough to afford them a defense. It may produce integration, but it will not produce freedom.

The Pennsylvania statute is a move toward freedom, for the rich and for the poor, for the white and for the black. It should be upheld.

CONCLUSION.

It is submitted that a most careful examination of the Pennsylvania Nonpublic Elementary and Secondary Education Act, not only on its face, but also in the light of its legislative history, reveals a valid exercise of legislative power, which is directed to a proper public purpose, the primary effect of which neither advances nor inhibits religion, and which does not create an excessive involvement of church and state. Accordingly, the decision of the court below should be affirmed.

Respectfully submitted,

JAMES L. J. PIÉ,
Deputy City Solicitor,
and
LEVY ANDERSON,
City Solicitor,
Attorneys for City of Philadelphia,
Amicus Curiae.

Appendix

(Seal)

CITY OF PHILADELPHIA

JAMES H. J. TATE
Mayor

July 14, 1970.

Mr. William D. Valente,
President,
The Board of Education,
Archdiocese of Philadelphia,
310 North Nineteenth Street,
Philadelphia, Pennsylvania 19103.

Dear Bill:

Thank you for your letter with respect to the test case before the Supreme Court of the United States, challenging the validity of the Pennsylvania Nonpublic Elementary and Secondary Education Act under the federal constitution.

I do share, of course, your concern to assure the success of our litigation, not only from a personal standpoint, but also because its outcome has a direct bearing upon the hard-pressed urban school systems.

Inasmuch as the City of Philadelphia indeed set the pattern and provided much of the support and drive for this legislation, I would be delighted to join the proponents of the legislation by filing a brief amicus for the City of Philadelphia.

I have instructed the City Solicitor, Levy Anderson, Esquire, and his Deputy, James L. Pié to proceed immediately on this matter.

With all good wishes and kindest personal regards, I remain

Sincerely yours,
JAMES H. J. TATE,
Mayor.

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H. J. TATE
Mayor
14, 1970.

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INTEREST OF AMICUS CURIAE CITY OF ERIE.

The City of Erie, Pennsylvania's third largest city, is a governmental subdivision of the Commonwealth of Pennsylvania with a population of approximately 140,000. Erie's public school enrollment is in excess of 22,000, and approximately 11,000 additional pupils are enrolled in some 21 elementary and 5 secondary non-public schools. Erie is not immune from the educational and financial crises which besiege Pennsylvania's public and non-public school systems: a shortage of textbooks and supplies, overcrowding, double shifts, the adaptation of non-classroom spaces for class instruction, and increased enrollments. Erie's schools are not only crowded, but tend to be old and in need of modern equipment. Erie's 1970 public school budget has already compelled a difficult tax increase, and its public school operating budget of $18.8 million faces a one-half million dollar deficit, exclusive of capital outlay and federal programs. Erie's "newest" public school is now 15 years old. At least a $10 million capital improvement program is desperately needed. These conditions, which severely jeopardize the quality of urban education, also militate against the social and economic future of the entire metropolitan Erie community.

Recognizing that Pennsylvania's non-public schools provide a definite secular and public welfare service, the Pennsylvania State Legislature responded to this educational crisis by enacting the Public Elementary and Secondary Education Act of 1968, 24 Purdon's Pa. Stat. Annot., §5601, *et seq.* (hereinafter "Act") to insure that the Commonwealth's public and non-public school systems would continue to provide the competent secular education necessary to enhance the general quality of life in the Commonwealth. The Act specifically found that should a majority of the present non-public school pupils transfer to public

schools, Pennsylvania would be confronted with "an intolerable added financial burden". (24 Purdon's Pa. Stat. Annot., § 5602(6).) The City of Erie simply could not meet the tax burden of an additional $7,843,444 operating budget directly attributable to the transfer of present non-public school pupils to Erie's public schools. Additional millions of tax dollars would be required for capital expenditures.

Accordingly, the City of Erie supports the Commonwealth's purchase of specifically designated secular educational services from qualified non-public schools, and submits this brief *Amicus Curiae* which underscores the Act's compatibility with the Establishment Clause of the First Amendment.*

* This Brief discusses only the arguments made by Appellants on the Establishment Clause. The City of Erie, however, fully supports the decision of the Court below in all respects.

ARGUMENT.

The Act's Primary Purpose and Primary Effect Are Secular.

In responding to the crises confronting Pennsylvania's public and non-public school systems, the Legislature specifically found "the imperative need to spur the maximum educational development of every young American's educational capacity." (24 Purdon's Pa. Stat. Annot., § 5602.) The Legislature also specifically delineated the economic and social realities underlying this educational challenge: rapidly increasing costs, a rising school population, consequent demands for more teachers and facilities, inflation, and the competing demands of other modern state governmental responsibilities for limited tax dollars.

To provide all Pennsylvania children with quality secular educational services in four specified subjects—mathematics, modern foreign language, physical science, and physical education—the Legislature carefully built quality and fiscal controls into the Act. The Act's funds, including administrative funds, accrue in a separate State Horse Racing Fund which cannot affect any public school funds. (24 Purdon's Pa. Stat. Annot., §§ 5606(a), 5607(a).) No reimbursement assistance can be received by any school until acceptable secular educational services have been rendered. As a condition for the purchase of the specified secular educational services, the State Superintendent of Public Schools approves textbooks and other instructional materials, and approves the attainment of a satisfactory level of pupil performance in standardized tests. By 1973, all non-public school teachers must attain certification standards, again approved by the State Superintendent, equal to public school teacher standards. (24 Purdon's Pa. Stat. Annot., § 5604.)

In urging this Court to nullify the Act, and to substitute their judgment of the public welfare for that of the

Legislature, Appellants' principal argument is that the Act is constitutionally deficient under the Establishment Clause of the First Amendment. Each of the Appellants' arguments ultimately rests upon an unrealistic monolithic view of parochial schools. Thus, Appellants characterize, in absolutistic terms, all such schools as "schools whose entire raison d'etre is religious and in which religious instructions, symbols, readings, and ceremonies abound." (Appellants' Brief, p. 22.)

This basic premise of each of Appellants' arguments is squarely at odds with this Court's well-settled holdings that parochial schools in fact pursue two distinct goals—religious instruction and secular education. *Pierce v. Society of Sisters,* 268 U. S. 510 (1925). This Court has repeatedly held that the state can advance legitimate secular, public welfare goals through sectarian institutions. "The First Amendment . . . does not say in every and all respects that there shall be a separation of church and state." *Zorach v. Clauson,* 343 U. S. 306, 312 (1952). Again, in *Board of Education v. Allen,* 392 U. S. 236 (1968) this Court recognized the legitimate secular educational contributions of non-public schools:

> "However, this Court has long recognized that religious schools pursue two goals, religious instruction and secular education.
>
> * * *
>
> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They

have considered high quality education to be an indispensable ingredient for achieving the kind of nation and kind of citizenry that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. *This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."*[1] 392 U. S. 245, 248-49 [Emphasis supplied]

Since this Court has long recognized that non-public schools can indeed perform a secular educational function, Appellants' argument is reduced simply to the proposition

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1. Pennsylvania courts have long constitutionally sanctioned the attainment of public welfare secular goals through sectarian institution. See *Schade v. Allegheny County Institution District,* 386 Pa. 507 (1956). In sustaining the constitutionality of the Pennsylvania statute requiring school boards to provide comparable free bus transportation to both public and non-public elementary and high school pupils, the Pennsylvania Supreme Court observed "the high budgets required to maintain our public school system is a matter of concern to everybody. The imperative need for the best in education for the youth of our Commonwealth convinces the civic minded citizens of the inevitability of heavy taxes to meet the expense, but it does not lessen the weight of the financial burden he must carry. Therefore, any procedure which may lighten that burden consistent with maintaining the highest state educational standards is warmly welcomed by the taxpayers". That court noted that Pennsylvania's non-public school system financially benefits Pennsylvania taxpayers in an amount equal to one-third of the Commonwealth's entire educational budget. "Indeed if non-public schools were to be abolished, the increase in tax burden to the citizens of the Commonwealth would be noteworthy and the Commonwealth would be hard put to provide the buildings, teachers, and equipment for the flood of additional children released into their care and responsibility." *Rhoades v. Abington Twp. Sch. Dist.,* 424 Pa. 202, 209, 210 (1967). It has been conservatively estimated that to absorb Pennsylvania's approximately 600,000 non-public school children into the public schools would take a prohibitive 400 new schools, 20,000 new teachers, and $400 million. *Philadelphia Evening Bulletin,* April 6, 1969.

that an illicit purpose of benefitting non-public schools can be gleaned from a selective recourse to the comments of a few legislators. This attempt at "guesswork," in discerning the motives of the legislature "on the basis of what fewer than a handful of Congressmen[2] said about it," *United States v. O'Brien*, 391 U. S. 367, 384 (1968), collides with the well-established constitutional principle that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As this Court recently noted, *United States v. O'Brien*,[3] *supra*, at 383-384, in refusing to look beyond the valid legislative purpose set forth on the face of a statute in a First Amendment case:

> "Inquiries into Congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation the court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in these circumstances are sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to void a statute if it is under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.* What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it and

2. For example, the remarks of only two legislators in the State Senate are seized upon as evidence of the entire Senate's purpose by Appellants. See Appellants' Brief, Add. p. 10.

3. *O'Brien, supra*, at 385, also distinguishes *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) and *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), two of the cases specifically relied upon by Appellants (pp. 28, footnote 7, and 30) and characterizes their holdings as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional. . . . ." 391 U. S. at 384.

the stakes are sufficiently high for us to eschew guesswork. *We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it''.* [Emphasis supplied.]

The Act's primary effect of providing quality secular educational services to all Pennsylvanians neither advances nor inhibits religion. The Act's incentive will raise both student and teacher secular educational performance. In doing so, it opens new vistas of educational cooperation and achievement. President Nixon's March 3, 1970 Educational Message to Congress [4] noted a variety of tangible secular educational benefits emanating from the Act—i.e. enhanced educational diversity, educational innovation, and special opportunities for minorities. Indeed, in *Rhoades v. Abington Twp. Sch. Dist.*, 424 Pa. 202, 209, 210 (1967), the Pennsylvania Supreme Court found that the non-public school's annual saving to Pennsylvania taxpayers was an amount equal to one-third of the Commonwealth's total educational budget.

President Nixon told Congress that if most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operation, with an estimated $5 billion more needed for facilities.

Thus, the Act's purpose and effect clearly fall within the ambit of the constitutionally sanctioned ''benevolent neutrality'' which permits religious institutions to exist without sponsorship and without interference. *Walz v. Tax Commission of the City of New York*, 397 U. S. 664, 669 (1970).

---

4. *Weekly Compilation of Presidential Documents*, Vol. 6, No. 10, March 9, 1970, p. 312.

CONCLUSION.

The City of Erie, Pennsylvania, *Amicus Curiae*, respectfully submits that the issues raised by Appellants in this appeal were properly decided by the Court below, and that the judgment below should be affirmed in all respects.

Respectfully submitted,

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E. ROBERT SEAVER, CLE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOOD GIRL'S HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., AMICUS CURIAE

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No. 1189.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

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Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., AMICUS CURIAE

Interest of the Amicus

This brief is submitted with the consent of counsel for the parties, on behalf of the National Association of Independent Schools, Inc. ("the Association"), a Massachusetts corporation.

The Association's membership comprises approximately 768 independent schools engaged in primary and secondary education in 43 states of the United States, including 56 schools in the Commonwealth of Pennsylvania. Its membership also includes 27 regional school associations (one of which is the Pennsylvania Association of Independent Schools, Intervenor Defendant-Appellee) and 16 other associations of teachers, alumni and scholarship groups connected with independent schools.

The stated purposes of the Association are

> "to assist and strengthen independent schools in the United States . . . to aid them to serve effectively the free society from which they derive their independence." National Association of Independent Schools, Inc., By-Laws, Art. II.

Members of the Association include schools which in general terms may be categorized as either (a) having no direct relationship of any kind with a religious group, some of these including in their programs, however, some religious observance varying in nature and degree from school to school; (b) affiliated with but not supported or controlled by a religious group; or (c) supported or controlled in varying degrees by a religious group. Schools in the latter two categories would be in the minority.

The Association files this brief because it believes that state aid in the form provided under the Pennsylvania statute before the Court is permitted by the Constitution, and is vital to the ability of independent schools to make their full contribution to the public welfare of American society.

Statement of the Case

Individual citizens and taxpayers of, and associations of persons residing in, the Commonwealth of Pennsylvania challenged the constitutionality of the Pennsylvania

Nonpublic Elementary and Secondary Education Act of June 19, 1968 (the "Education Act"); 24 Purdon's Statutes §5601-09 (Supp. 1970), (hereafter cited as "P.S."). Enacted by the Pennsylvania General Assembly, the Education Act empowers the Commonwealth to contract for the purchase of "secular education service" to be furnished by and in non-public schools in Pennsylvania which meet the compulsory school attendance requirements of State law.

The General Assembly's reasons for enacting the Education Act are stated in Section 2 thereof and include the following:

> "It is hereby determined and declared as a matter of legislative finding . . .
>
> "(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education . . ." 24 P.S. § 5602.

The Education Act provides, in essential part, for the creation of a fund dedicated to "purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science and physical education . . ." 24 P.S. § 5604. The Education Act further provides that courses in these subjects shall not "include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." 24 P.S. § 5603(3).

The defendants are State officials responsible for administration of the Education Act, and certain schools with which the Commonwealth has contracted for the purchase of secular educational services under the Education Act.

The appellants herein brought suit in the United States District Court for the Eastern District of Pennsylvania, basing jurisdiction on the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 28 U.S.C. § 1343. The defendants moved to dismiss the complaint on a number of grounds. The three-judge Court dismissed the complaint, and included in its opinion a determination that the Education Act was constitutional. 310 F. Supp. 35 (E.D. Pa. 1969).

Scope of this Brief

This brief is directed solely to the question of the constitutionality of the Act under the First Amendment to the Constitution of the United States, to the extent the First Amendment is made applicable to the States by the Fourteenth Amendment. The pertinent parts of these amendments are as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U. S. Const. Amend. I.
>
> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ." *Id.* Amend. XIV, § 1.

Summary of Argument

The decision of the United States District Court for the Eastern District of Pennsylvania should be affirmed. The Education Act meets the applicable tests established by this Court for determining the validity of laws providing

for aid to nonpublic schools; this is particularly so where, as here, State action is involved with the result that the Establishment Clause must be considered in the light of the applicable provisions of the Fourteenth Amendment, which relates only to a deprivation of liberty.

I

The Pennsylvania statute meets the tests for constitutionality under the Establishment Clause.

A variety of tests under which the constitutionality of the Education Act should be determined have been set forth in opinions of the present Justices of this Court who wrote in *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Board of Education* v. *Allen*, 392 U. S. 236 (1968); and *Walz* v. *Tax Commission*, 397 U. S. 664 (1970). These tests are here considered as expressed by the individual Justices of the Court. They establish with unanimity that the Pennsylvania statute violates neither the First nor Fourteenth Amendment.

The Chief Justice

Considering the validity under the Establishment Clause of a grant of tax exemption for the property of churches and certain other nonprofit organizations, the Chief Justice, speaking for the Court in *Walz*, states the intendment of the Clause as follows:

> "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U. S. at 668.

The question is whether the Education Act in its effect can be deemed to constitute:

> "sponsorship, financial support and active involvement of the [State] in religious activity."

Clearly there is no sponsorship. The benefits of the Education Act are provided for all independent schools without regard to religious affiliation, so that the focus implicit in sponsorship is lacking. Furthermore, the Education Act's preclusion of any religious teaching negates the remotest trace of sponsorship. For the same reasons there is no financial support of "religious activity". There is of course support of secular teaching, just as there was in providing secular books, as in *Allen*, or as there would be in the State's furnishing televised instruction for use by all schools in the State. But none of these constitute financial support of "religious activity", nor can they be deemed to produce involvement of the State in such activity.

With the meaning of "establishment" in mind, the Chief Justice's statement in *Walz* of First Amendment requirements can be applied:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion." *Id.* at 669.

There being no establishment, is there the prohibited interference? Certainly not in the Education Act. Participation under the Education Act is voluntary. No school is required to participate. No school has charged the State with interference, either in this or any other known proceeding.

The Chief Justice's opinion in *Walz* expressly affirms the type of secular support referred to above. It holds that

although the tax exemption there considered was undoubtedly beneficial to a church, the mere fact that a statute has as one of its effects the provision of "aid" to a religious organization will not invalidate the statute any more than it did in *Allen*, where:

> "making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books." *Id.* at 671-72.

Thus, although teaching services contracted for under the Act constitute a form of aid to secular activities of a religious institution, the Court has eliminated this as a determinative factor on the issue of constitutionality.

The *Walz* opinion next considers whether the legislative purpose in granting tax exemption is either advancement or inhibition of religion—whether it can be regarded as sponsorship or hostility. The conclusion is that the purpose of tax exemption is none of these because the State:

> "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups." *Id.* at 673.

The statute now before the Court meets this test. The legislature has not singled out "one particular church or religious group or even churches as such". And it has granted the right to contractual teaching arrangements to all schools within a broad class. As in the case of the class benefited by the New York tax exemption, it may equally be said as the Chief Justice said in *Walz:*

> "The State has an affirmative policy that considers these groups [in the present case non-public schools] as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." *Id.* at 673.

The Court refuses to base its conclusion of constitutionality on the existence of social welfare services which are usually a concomitant of a church's function, this because the extent of social services rendered is so variable an aspect of the work of religious bodies as to make governmental evaluation a form of entanglement between government and the church which is to be avoided:

> "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." *Id.* at 674.

Obviously the entanglement which would result from an attempted evaluation of "social services" which are susceptible of no known standards of measurement are very different from the necessary and established relationships between state education departments and those schools maintained by religious and nonreligious groups. Each of the beneficiary schools is a member of a class which, before the present legislation was enacted, had a necessary and continuing relationship with the State. This grew out of the fact that educational standards are the concern of the State and any school purporting to provide an education must comply with State criteria, just as a building, whether owned by a religious or nonreligious body, must comply with building law requirements. As stated by Justice White in *Allen*:

> "Since *Pierce* [*Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925)], a substantial body of case law has confirmed the power of the States to insist that attend-

ance at private schools, if it is to satisfy State compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." 392 U. S. at 245-46.

The Pennsylvania Public School Code of 1949, 24 P.S. §§ 1-101 to 27-2702 (1962), contains numerous specifications of the type referred to by Justice White:

§ 15-1511. Subjects of instruction; flag code

"In every elementary public and private school, established and maintained in this Commonwealth, the following subjects shall be taught, in the English language and from English texts: English, including spelling, reading, and writing, arithmetic, geography, the history of the United States and of Pennsylvania, civics, including loyalty to the State and National Government, safety education, and the humane treatment of birds and animals, health, including physical education, and physiology, music, and art."

§ 16-1605. Courses of Study

"(a) In all public, private or parochial schools, there shall be integrated in the social studies curriculum courses of study as provided in this act. . . . During grades seven through twelve inclusive, there shall be included at least four semesters or equivalent study in the history and government of that portion of America which has become the United States of America, and of the Commonwealth of Pennsylvania, of such nature, kind or quality, as to have for its purpose the developing, teaching and presentation of the principles and ideals of the American republican representative form of government . . ."

It is further provided in § 16-605(a) that the study of the history of the United States:

> "shall also be such as will emphasize the good, worthwhile and best features and points of the social, economic and cultural development, the growth of the American family life, high standard of living of the United States citizen, the privileges enjoyed by such citizens, their heritage and its derivations of and in our principles of government."

Thus the Education Act before this Court brings about no change in the relationship between the State and the schools, nor any real increase in the elements of the existing necessary State supervision. The fields of study in which the contractual services can be furnished are, as pointed out, in themselves limited to those where any realistic concern of involvement with religious instruction is *de minimis*. Mathematics, physical education, physical sciences and modern languages cannot seriously be regarded as vehicles for any likely introduction of religious dogma. Accordingly the State's entanglement, if such it can be called, is one already in existence and involves only secular teaching standards which the State will simply continue to apply in determining the schools' qualification *qua* schools.

Mr. Justice Brennan

Mr. Justice Brennan's concurring opinion in *Walz* adds other pertinent and basically similar tests to those expressed for the Court. Referring to his opinion in *Schempp*, he points to criteria which the Court "has consistently sought to mark in its decisions expounding" the First Amendment. The Constitution forbids:

> "'those involvements of religious with secular institutions which (a) serve the essentially religious

> activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.'" 397 U. S. at 680, quoting *Schempp*, 374 U. S. at 294-95 (concurring opinion).

The emphasis is on what is "essentially" religious, not merely religious. It must be an "essentially" religious activity or purpose or means before it constitutes an excessive involvement. Clearly no one of these criteria is violated by the Education Act. The "essentially" religious activities of the schools are not served; nor are the organs of government used for "essentially" religious purposes; the Education Act precludes such involvement both by limiting the areas of study in which contracted services will be furnished, and by forbidding the teaching of "any subject matter expressing religious teaching or the morals or forms of worship of any sect." And for the same reason, the Education Act cannot be said to use "essentially religious means to serve governmental ends, where secular means would suffice". The Education Act provides secular, not religious means, and only if one were to assume violation by a school of the express strictures of the Education Act, followed by improper claims for payment thereunder, would there be any religious involvement. There is no basis for any assumption of such wrongdoing on the part of the Schools. As the Court said in *Allen*: "Absent evidence, we cannot assume that school authorities . . . will not honestly discharge their duties under the law." 392 U. S. at 245.

Furthermore, Mr. Justice Brennan points out in *Walz* that there are two basic secular purposes which provide social justification for tax exemption of religious organizations; first, such organizations "contribute to the well being of the community in a variety of nonreligious ways", 397

U. S. at 687, and secondly, they "uniquely contribute to the pluralism of American society by their religious activities." *Id.* at 689. These secular benefits are even more pronounced in the case of the church school, and under the restrictions imposed by the Education Act, the religious concomitant is minimized, if not eliminated. In other words, where, as under the Education Act, the aid is restricted to the secular teaching function of the institution, it becomes an *a fortiori* case as compared with a tax exemption which of necessity directly benefits both the secular and religious activities of the institution.

Mr. Justice Brennan shares the Court's concern as to the degree of State involvement with religion which a statute entails, but as pointed out above, there is no involvement under the Education Act over and above that previously existing and applicable alike to nonreligious and religious schools.

Mr. Justice Harlan

Mr. Justice Harlan's tests, as expressed in his concurring opinion in *Walz,* emphasize the two requirements of "neutrality" and "voluntarism", meaning that the government must not "favor religion over nonreligion, nor sponsor a particular sect, nor encourage participation or abnegation of religion." 397 U. S. at 694. The Education Act does not favor religion over nonreligion—all independent schools qualify for aid, whether religious or not, and when religious, irrespective of the particular religion. Nor is the Education Act responsible for any increase in the necessary State-school relationship which, as stated above, is inherent in the position of any school which must meet State educational requirements.

The same precepts are found somewhat differently expressed in Mr. Justice Harlan's concurring opinion in *Allen*, where he said:

> "I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom,' [citing *Schempp*, 374 U. S. at 307] it is not forbidden by the religious clauses of the First Amendment." 392 U. S. at 249.

Not only is the Education Act expressly and carefully "calculated to achieve nonreligious purposes", it also clearly does not entail State involvement which could give rise "to divisive influences and inhibitions of freedom". Schools are free to contract or not contract under the Education Act, and if they contract, they know precisely the terms on which their contract, meaning their secular commitment, is to be fulfilled. Finally, the Education Act meets the Justice's further criterion expressed in *Allen*, by not employing religion "as its standard for action or inaction." *Id.* at 250. The Education Act is not concerned with religion; it is only concerned with secular teaching.

Mr. Justice White

The particular tests heretofore relied upon by Mr. Justice White in his opinion in *Allen*, particularly as supplemented by his concurrence in *Walz*, are also tests which the Pennsylvania statute can readily meet.

Basic to Mr. Justice White's opinion in *Allen* is the *Schempp* test ("a secular legislative purpose and a primary effect that neither advances nor inhibits religion," 374

U. S. at 222), a test which the Education Act meets as fully as did the statute in *Allen*. The General Assembly has declared a factually convincing secular purpose, and the primary effect of neither advancing nor inhibiting is guaranteed by the Education Act's purposefully restrictive provisions. And although Mr. Justice White's opinion in *Allen* points to the fact that under the technical provisions of the New York book-furnishing statute, "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools", 392 U. S. at 243-44, he recognizes that free books "make it more likely that some children choose to attend a sectarian school, thus helping the school as in the case of bus transportation." *Id.* at 244. This concession, plus Mr. Justice White's concurrence in *Walz* where the exemption is clearly a direct benefit to the institution, would indicate that in his view and the Court's, exclusively "child benefit" (rather than institution benefit) is not by any means a requisite for constitutionality. In fact, Mr. Justice White in *Allen* appears to have relied most heavily on the undoubted social benefits referred to by Justices Brennan and Harlan in their decision in *Walz*. He states as clearly basic to his decision in *Allen*:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. *Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed*

> *opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.*" 392 U. S. at 247-8 (emphasis added).

It is the support of this secular function alone to which the Education Act is scrupulously limited.

Mr. Justice Stewart

Mr. Justice Stewart, joining with the majority in both *Allen* and *Walz*, reaffirms the following test expressed in his dissent in *Schempp*, where he pointed out:

> "But insofar as the *McCollum* decision rests on the Establishment rather than the Free Exercise Clause, it is clear that its effect is limited to religious instruction—to government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets." 374 U. S. at 314.

Neither the furnishing of books, nor the exemption from tax of a broad category of eleemosynary and religious institutions, could be deemed a "support of proselytizing." Nor is such support found in the teacher funding of the strictly secular courses provided for under the Education Act, particularly as the benefits under the Education Act are provided for the broad category of religiously and nonreligiously oriented schools.

Mr. Justice Black

Mr. Justice Black, through joining in the Court's opinion in *Walz*, establishes that his interpretation of the Establishment Clause fits within the framework agreed to in

Walz by all but one member of the Court. And we have pointed out that the basic tenets of the Court as stated by the Chief Justice in *Walz* do affirmatively sustain the Act. Mr. Justice Black's dissent in *Allen* would not be contrary to a finding that the Education Act is constitutional. For the Education Act provides substantially greater assurance against religious involvement than did the New York book-furnishing statute. The books were free to be used in conjunction with or as aids to teaching in areas which are expressly forbidden under the Education Act. The assurance of a clear separation of the secular from the sectarian is thus found to a far greater degree under the Education Act.

Furthermore, Mr. Justice Black's opposition expressed in his *Allen* dissent to paying "the salaries of the religious school teachers", 392 U. S. at 253, though not there in issue, cannot be deemed to foreclose payment for the kind of teaching which, as under the Education Act, is so contractually restricted as effectively to eliminate any religious issue whatsoever. The teaching provided for under the Education Act, with its express prohibition of any religious teaching, is the equivalent of what would be obtained if teachers, having no connection with any religion, were contracted for and sent into the school to teach exclusively secular subjects. Inherent therein is no more "establishment" than the payment of the bus driver in *Everson.*

Mr. Justice Douglas

Mr. Justice Douglas took his stand with the majority in *Everson;* he then distinguished *Everson* in his dissent in *Walz* ("This case is quite different. Education is not involved." 397 U. S. at 704); and he added that he had "grave doubts" about his position with the majority in

Everson because he is "convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause." *Id.* at 703. But it is a very different thing, on the one hand, to provide tax exemption and busing, both of which of necessity sustain equally the religious functions as well as the secular; and on the other hand, to provide purely secular services. Under the Education Act, the service which is called for is not dissimilar to State furnished school instruction by television, i.e., an input of purely secular education. It is not in any usual sense "a grant" to an institution teaching a sectarian creed. The institution cannot use the funds for any sectarian purpose. Would furnishing of secular TV instruction to a religious school be a "grant"? Clearly not; and no more is the specified secular output of a teacher *in praesenti.*

Thus the restriction which Mr. Justice Douglas finds in the Establishment Clause as applied to the laws considered in *Everson* and *Walz* provide no bar to constitutionality of the Education Act.

* * * * *

From the foregoing review of opinions in the most pertinent cases, it appears impossible to find any one statement which will suffice to distinguish the permissible from the unpermissible under the Establishment Clause. It is this fact which provides the reason for testing the present law with as many different tests as can be found in the recent cases which have so fully elicited the views of this Court. The Education Act appears to meet the most stringent requirements of any of these tests. Accordingly the decision of the lower court should be affirmed.

II

The Establishment Clause is not applicable to the States where, as here, there is no interference with religious liberty.

The First Amendment applies to the States only to the extent that it has been made applicable by the Fourteenth. But the latter can be operative only to the extent that State action either denies equal protection (which, for the reasons found by the Court below, is not the case here) or is found to "deprive any person of life, liberty or property without due process of law". A denial of the free exercise of religion would be a deprivation of liberty; consequently to regard the Fourteenth Amendment as incorporating the Free Exercise clause of the First, is entirely consistent with the terms of the Fourteenth. But unless the plain language of the Fourteenth is to be disregarded, there is nothing in the Fourteenth which provides any basis for incorporating the Establishment Clause except where establishment can be found to involve some appreciable deprivation of religious liberty.

The earlier opinions of this Court regarding the incorporation of the First Amendment by the Fourteenth did not advert to this important distinction between the two Religious Clauses. The first of these opinions was in *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), where the Court declared both the Religious Clauses to be applicable. But the actual issue was clearly one of free exercise—public criticism of the Roman Catholic Church and solicitation of funds—rather than establishment; and the Court spoke of *both* clauses in terms of religious freedom: "Thus the Amendment embraces two concepts—freedom to believe and freedom to act." *Id.* at 303.

It was not until *Everson* that the Court expressly considered the constitutionality of State legislation on establishment grounds, but the opinion there gave no explanation of the basis for incorporation of the Establishment Clause by the Fourteenth Amendment. It merely indicated that both Religious Clauses were applied to the States by the Fourteenth Amendment, and cited in support of this proposition *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), which was concerned solely with free exercise—the peddling of religious literature.

Since *Everson,* the Court has on several occasions declared that the Establishment Clause was applied to the States by the Fourteenth Amendment, *e.g. Engel* v. *Vitale,* 370 U. S. 421 (1962); *McCollum* v. *Board of Education,* 333 U. S. 203 (1948). But in only one case has an opinion discussed the basis on which the "liberty" protected by the Fourteenth Amendment embraces freedom from establishment. This was the concurring opinion of Mr. Justice Brennan in *Schempp:*

> "It has also been suggested that the 'liberty' guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a 'freedom' of the individual . . . The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause 'was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith.'" 374 U. S. at 256, quoting *McGowen* v. *Maryland,* 366 U. S. 420, 464 (1961).

This opinion clearly recognized, as is indeed inescapable from the wording of the Fourteenth Amendment, that—whatever may be the limits on Federal establishment—State establishment is outlawed only to the extent that it deprives any person of religious liberty. And the cases in which the Court has invalidated State laws on establishment grounds have all involved such a deprivation. In *McCollum* v. *Board of Education, supra,* there was a strong element of State pressure in favor of religious teaching in the public schools: "Pupils compelled by law to go to school for secular education are released in part from their legal duty upon condition that they attend religious classes." 333 U. S. at 209. In *Engel* v. *Vitale, supra,* the prayer officially prescribed for use in public schools obviously had the effect of governmental pressure in favor of religion, though direct coercion was obviated by excusing individual pupils from participation: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . to conform . . . is plain." 370 U. S. at 431. In *Schempp,* Bible reading in the public schools clearly had a similar effect.

But in the present case there is no trace of governmental pressure in favor of any religion or of religion in general. The only element of compulsion involves collection of taxes, and the proceeds are used in a completely neutral and nondiscriminatory manner to aid secular education regardless of whether it takes place in religious or nonreligious schools. The Court cannot strike the Education Act down without holding for the first time that the Establishment Clause, as applied to the States by the Fourteenth Amendment, precludes state aid involving no deprivation of religious liberty. To so hold would, we submit, be inconsistent with the plain wording and purpose of that Amendment.

It may be that the line of reasoning suggested above would lead to the conclusion that the States are freer to aid religious institutions in ways that are forbidden to the Federal Government. As Mr. Justice Harlan observed, concurring in *Walz*:

> "It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government." 397 U. S. at 699.

This need not be decided now. The important point is that so long as there is no restraint on complete religious liberty, the Constitution should not be interpreted to restrict the freedom of the several States from working out the new relationships between public and independent school education required by changing economic, social and educational conditions. The importance of allowing State experimentation within the framework of the First and Fourteenth Amendment is as great now as when it was eloquently described by Mr. Justice Brandeis during another critical period in our history:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise

> of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932), dissenting opinion (footnote omitted).

Since this warning was sounded, the Court has disclaimed the power it then asserted to apply to State law a substantive test of due process. But it now asserts, as it did not then, the power to apply a substantive test of establishment. This power we do not question, but we urge that it too must be applied with caution when invoked to "stay experimentation in things social and economic". Only a genuine threat to religious liberty can justify the striking down of a State's attempt in good faith to meet an economic crisis in education by availing itself of the facilities of all schools—public and private, religious and nonreligious—to serve the public interest.

III

Other issues raised by Appellants.

This brief has not dealt with numerous other issues raised by Appellants. With respect to them, reliance is placed on the unanimity with which they were disposed of below, and the grounds for affirmance stated in the brief of the Pennsylvania Association of Independent Schools, to which this Association subscribes.

There is, however, in Appellants' brief, such distortion of fact, particularly with respect to two aspects of the position of independent schools, as to call for correction here.

Appellants represent that the Pennsylvania independent schools, other than the parochial schools, comprise "a white school system," (Appellants' Br. at 49), and "obviously do not need aid," (*Id.* at 34). The facts are exactly contrary.

One of the primary reasons why independent schools require aid is because of their determination to serve a broader segment of society and the large amount of scholarship aid which this entails.

Most of the schools comprising the Pennsylvania Association of Independent Schools are members of the National Association. The Board of Directors of the latter Association adopted a statement of policy on June 17, 1968 which results in denying the services and privileges of the National Association, to any school designed to provide segregated education. The statement included the following:

"Statement of the NAIS Board of Directors on Open Enrollment Policy

"1. The Board of Directors of NAIS stands firmly behind the principle that in the member schools of the Association the admission of students, as well as the employment of school personnel, should be open to all who are qualified regardless of race or color, and it believes that this principle is both firmly grounded in the spirit of American democracy and in keeping with the public responsibilities of the independent school.

"2. The Board is aware of the establishment in recent years of schools whose purposes and policies are designed to provide segregated education; it believes that such schools are contrary to the best interests of American society and, therefore, of the independent school, and it will not extend to such schools the services or privileges of the Association.

"3. The Board urges in the strongest possible terms that all member schools of the Association adopt or reaffirm admissions policies and practices which are in keeping with the principles of open enrollment. The NAIS Board and staff offer whatever services they may render to this end."

The National Association's Minority Group Survey for the 1969-70 school year shows, among other things, the following:

(i) Within the Association's membership, an increase in black enrollment from 3,720 to 7,617 or 105% over what it was three years before.

(ii) A black and other minority group enrollment of 3.5% of total enrollment of all member schools.

(iii) Receipt of financial aid by one out of two minority group students, compared to one out of ten in the total school population of members.

(iv) Increase in black faculty members from 149 in 1966-67 to 244 in 1969-70 (a 63% increase).

Obviously the foregoing is utterly inconsistent with Appellants' attempt to picture independent schools as a "white" system. Integration presents a difficult problem in every area of our society. It is heightened in the case of the independent school because such schools must depend primarily on tuition payments for their existence, and minority groups are only beginning to have the place in society which permits them to have the means. But the purpose of independent schools, including those in Pennsylvania, is to have open enrollment and an integrated enrollment within the limits of their financial capacity.

Wholly aside from the added economic burden which integration places on independent schools, the economic facts of today are such as to threaten their continuance if public support is not forthcoming. Only a minute fraction of independent schools have sufficient endowment to provide income of any significance; independent schools find it increasingly difficult to compete with public school teacher salaries; and it is the Association's view that parents who contribute through taxation to the support of public schools

on the level of support which those schools now receive cannot realistically be expected to meet further increases in tuition charges of independent schools. It is this combination of circumstances which makes public support for the independent school not only justified but requisite for the fulfillment of the role which the independent school should and can play in our society. A state legislature would therefore certainly be economically justified in providing non-public schools with aid in an amount equal to the cost of educating the same child in a public school. It would, in fact, be wholly justified in providing more, if it thought the benefit to education as a whole, whether for experimental reasons, for standard setting, or for other reasons, justified larger support.

The demeaning reasons ascribed by Appellants to the considered action of the Pennsylvania legislature (Appellants' Br. at 34,) are therefore wholly without justification, and appear to have been inserted solely in an effort to prejudice this Court against non-public schools in the hope that this would sway the Court in its decision of the controlling constitutional issues which have been considered above.

CONCLUSION

As a measure to aid secular education, expressly excluding religious teaching, the Education Act does not offend the Establishment Clause under the various tests to be found in the prior opinions of the Court and those of its concurring and dissenting members.

Since the Education Act involves no deprivation of religious liberty, it cannot violate the First Amendment as applied to the States by the Fourteenth.

The decision of the District Court should be affirmed.

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AUG 22 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

NO. 89.

ALTON J. LEMON, ET AL.,
Plaintiffs-Appellants,
v.
DAVID H. KURTZMAN, ET AL.,
Defendants-Appellees,
and
PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF OF THE CITY OF PITTSBURGH, AMICUS CURIAE.

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On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF OF THE CITY OF PITTSBURGH, AMICUS CURIAE.

INTEREST OF THE AMICUS

Pursuant to a Resolution of its City Council unanimously adopted on August 6, 1970, the City of Pittsburgh respectfully submits the following Amicus Curiae Brief.

The City of Pittsburgh, amicus curiae, is a political subdivision of the Commonwealth of Pennsylvania, whose boundaries are coterminous with the public school district of Pittsburgh. The public and non-public schools of the City educate slightly more than 132,000 elementary and secondary school children, of which approxi-

Interest of the Amicus.

mately 62% are enrolled in the public schools, and the remaining 38% are enrolled in the non-public schools. The overwhelming majority of the non-public schools are church related, Catholic schools.

The City of Pittsburgh is vitally interested in the Pennsylvania Non-Public Elementary and Secondary Education Act of 1968 (hereafter called Act 109) because that legislation bears substantially and beneficially upon the complex of problems and interests which are generally referred to as "the urban crisis". Specifically, Act 109 has advanced the welfare of all of the residents of the City by immediately ameliorating the following aspects of a continuing urban crisis:

a. It enables non-public schools to maintain their level of efforts and secular educational services to the city's non-public school children.

b. It advances the secular educational interests of the city's public school children whose education would undoubtedly suffer if the presently over-strained public school facilities and resources were required to be further spread and diluted in the event the non-public schools were not enabled to maintain their present secular educational efforts, due to lack of public assitsance, such as is provided by Act 109.

c. It ameliorates the prevailing over-burden of local real estate taxpayers, and state wide over-burden of citizen and business taxpayers, who provide the common source of funding for the operation not only of the public schools, but also of the city and state government budgets, which, like the

school district budget, have been continually under severe strain.*

d. It helps to preserve to the city indispensable and currently irreplaceable educational resources, the diversity and cross enrichment of educational experience, and a broad range of social service and community action centers which the non-public schools provide in support of city, state and federal social service programs.

e. It advances the general welfare of the city in additional ways, namely by providing training and skills for city business employments, and providing an institutional focus which tends to hold and stabilize residents' patterns in city neighborhoods which are so essential to stem the fiscally and socially harmful trends of flight to the suburbs by middle class citizens, taxpayers and workers.

In the face of the great financial crisis facing all educational systems and all levels of government, the city deems it in the clear public interest for government to provide assistance to the secular educational efforts of non-public schools, in the manner achieved by Act 109. The city believes that Act 109 is constitutional, as found by the court below, and is indispensable to the welfare of urban and metropolitan centers, such as Pittsburgh.

---

*The annual budget of the Pittsburgh School District ($74 million) is almost three-fourths the size of the annual budget for the government of the City of Pittsburgh ($104 million). The budgetary strain of the school district was evidenced by a systemwide teachers' strike in the public schools during the school year 1966-67.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

Of the numerous questions raised by the Appellants herein, only one appears to be substantial, namely, whether on its face and by its terms, Act 109 violates the Establishment Clause of the federal constitution. The other questions raised by the appeal are, we believe, patently insubstantial. The Appellants' plea of the necessity of a trial is untenable and inconsistent with their insistence in the court below that their action seeks to nullify the entire operation of Act 109, and represents an attack on the entire statutory scheme. Not being limited to any given practice or application to any specified school or schools, the action raises a flat question of constitutional law. Accordingly, this Brief is addressed solely to the issue whether Act 109, as it embraces all non-public schools, including church related chools, is constitutional under the Etablishment Clause.

ARGUMENT

I. The Controlling Test of Constitutionality Is Whether Act 109 Serves A Secular Legislative Purpose and A Primary Effect That Neither Advances Nor Inhibits Religion.

Within the past decade, this court, on three separate occasions, repeated the specific formula to be applied in testing the constitutionality of legislation under the Establishment Clause. See *Abington School District v. Schempp,* 374 U.S. 203 (1963); *Board of Education v. Allen,* 392 U.S. 236 (1968); *Walz v. Tax Commission,* 397 U.S. 664, (1970). While each of the cited cases involved distinguishable facts and relationships, each case made clear that, building upon past authority, the test for governing challenges under the Establishment Clause was that first announced in the *Schempp* case:

> "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion." 374 U.S. at 222.

The universality of the foregoing test is evidenced from its application to the issue of public school bible-reading in *Schempp,* to state provision of secular textbooks to parochial school children in *Allen,* and to tax exemption of houses of worship in *Walz.* In protecting the constitutional ideal of government neutrality toward religion, the quoted test was held in the *Allen* case to permit state assistance to the secular functions of church related elementary and secondary schools. Similarly, in *Walz,* the secular purposes and effects of tax exemptions to houses of worship were found to render tax exemptions

constitutional. It is thus clear from these decisions that the secular nature of aid, and not the fact of church relationship, is the controlling factor in determining constitutionality of government action. The actual decisions of this court thus belie attempts to avoid the central meaning of the constitutional test by recasting that test in terms of hypothetical or possible dangers that could inhere in government relationships with the church related service institutions. If therefore, Act 109, on its face, serves a secular legislative purpose and has a primary effect of aiding secular educational goals, it cannot be said to advance or inhibit religion or to violate the Establishment Clause as a matter of law.

II. The Purpose and Primary Effect of Act 109 Is Secular — and Not An Aid to Religion.

A. *The legislative purpose of advancing secular education.* By its very terms, Act 109 is manifestly secular in purpose. The title to the Act, its provisions on legislative findings and declaration of policy, its provisions on limitation of subjects covered, and its conditions of teacher certification, preference and testing, clearly point to, and confine the statutory operation to, the advancement of the secular education of children in non-public schools. This Act has now been in operation for two full years without any notable expression of dissatisfaction either by the governmental or educational agencies at the local or state levels. There is no basis whatsoever, either in the terms of the law, or in observable operation of the Act to justify Appellants' self-serving denial of the secular legislative purpose of this Act.

The legitimate interest of the state legislature to advance the secular education of children in non-public

and church-related schools, and the public interest in such legislation has been repeatedly expressed in numerous federal and state educational welfare statutes. Those interests were specifically acknowledged in *Board of Education v. Allen, supra.,* as well as in earlier decisions of this Court. See *Everson v. Board of Education* 330 U.S. 1 (1947); *Cochran v. Louisiana State Board of Education,* 281 U.S. 370 (1930). As stated in *Pierce v. Society of Sisters,* 268 U.S. at 510 (1925);

> ". . .if the state must satisfy its interests in secular education, through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

Later this Court declared the primacy of public interest in education:

> "[Education] is the very foundation of good citizenship . . . in these days, it is doubtful that any child can reasonably be expected to succeed in life if he is denied the opportunity of an education." See *Brown v. Board of Education,* 347 U.S. 483 (1954).

Most recently, this Court in *Waltz v. Tax Commission, supra.,* cited the holding of the *Allen* case that state assistance to the secular educational functions and goals of church-related schools meet the purpose, as well as effect test of non-establishment of religion.

B. *The Primary Effect of Act 109 is to improve the Secular Education of Children in Non-Public Schools and also of the Children in Public Schools*

Act 109 reimburses schools for instruction services and books in four secular subjects, namely mathematics,

foreign language, physical science and physical education. Ever since the passage of the National Defense Education Act, 20 U.S.C. 445, the expansion of a technological economy and the shrinking of distances between nations of peoples with different languages, the first three aided subjects have commanded the most urgent attention of government and educators. These subjects, along with that of physical education, are so clearly secular in their content and impact, that it is difficult to imagine how the appellants arrive at their conclusion that aiding those subjects advances religion or the religious function of a non-public school. A whole host of federal education aid laws and programs are directed specifically to the problems of science education and language education. Hence, to argue that such legislation is an establishment of religion, contradicts the entire national as well as state experience.

The subjects aided by Act 109 fall within the requirements of the compulsory education laws of Pennsylvania, to which the non-public and church-related schools are subject. In addition to these laws, controls are also imposed by Act 109 to insure a satisfactory and primary secular result, e.g. teacher certification, performance requirements, and testing of the students receiving the aided educational services. Thus, on its face, this statutory scheme insures a secular primary effect and indeed prohibits any such effect in aid of religion. See 24 Pa. Stat. Ann. §5603(3). A second, equally important, secular effect of Act 109 is the preservation of educational resources that are indispensable to the welfare of the entire school community. By enabling non-public schools to continue operations in the face of mounting fiscal crises, Act 109 forestalls the catastrophic conse-

quences of wholesale, non-public school closings. Both the likelihood of such closings without public assistance, and the chaotic results that would follow therefrom were acknowledged in the provisions of Act 109, and also by President Nixon in his Education Message to Congress, March 3, 1970, H.R. Document, No. 91-341, 91st Cong., 2d Sess.

The plight of the City of Pittsburgh provides a stark illustration of the realities of non-public education and its involvement in the secular educational enterprise of all citizens.

Due largely to volunteered and contributed professional and paraprofessional services, through church contributions, and to parental payment of annual tuition and fee charges ranging from $170 in elementary grades to $200 to $350 in secondary grades, the predominant non-public (Catholic) school system in Pittsburgh has been able to educate some 36,000 students at an approximate average per-pupil cost of $215.00 per year, as against the public school average per-pupil cost of $878.00 per year. Were the full cost of educating these non-public school students visited upon the city's public schools, indescribable harm would be visited upon the fiscal stability of the city government as well as the school district, and only the harshest tax consequences to the entire citizenry and economy of the city could ensue. See, *Rhoades v. Abington Township School District*, 424 Pa. 202, 210 (1967).

What is worse, even if the fiscal resources could be made available to assume the secular educational burden now borne by non-public schools, the education of citizens of Pittsburgh would be set back irretrievably

for many years. In terms of sheer physical space, the school district now lacks the capacity to accommodate its own students, no less absorb massive additional enrollments. The district is presently required to use 62 portable schools for its students, and was required to abandon a crash building program in recent years due to lack of funding sources. The overwhelming number of public schools are in dire need of replacement, having been built prior to 1930 so that the present building priority is to replace decrepit facilities, rather than adding sorely needed additional schools.

In view of the foregoing, it is clear that there is no viable or reasonable alternative for promoting sound secular education for public as well as non-public students, to the measures taken by Act 109 and that the undenyable effect of Act 109 is to advance the secular educational opportunities of all elementary and secondary school students, in all schools, by maintaining the educational potential and output of non-public schools which meet state educational standards.

With regard to Appellants' argument that Act 109 creates constitutionally impermissible involvements of government and religion, Appellants rely primarily upon abstract generalizations and a set of hypothetical horrors that are not supported by the terms of Act 109. As this court noted in *Walz,* many government-religion relationships are unavoidable if both are to remain free to serve society in areas of common interest. The continuity and detail of such relationships are not constitutionally conclusive. Rather the critical point is the primary effect of any such relationship. The degree and quality of the relationships created by Act 109 reflect long established similar relationships of a much greater

order between the states and church-related schools under the compulsory education laws and regulations. It is clear that such relationships are not unconstitutional, for otherwise this Court could not have decided, as it did in *Pierce v. Society of Sisters,* 268 P.S. 510 (1925), that parents and non-public schools may constitutionally educate children in compliance with state education laws; and inferentially that the continuous and detailed state supervision of church-related schools would not be a constitutional barrier to the exercise of the protected rights to freedom of choice in education.

By comparison with the voluminous forms of relationship and regulation between the state and church-related school, the few additional regulations created by Act 109 are microscopically de minimis, and could no more be unconstitutionally "excessive" than the compulsory education laws and regulations of all states, not to mention the great number of federal laws and regulations affecting such schools.

The appellants' abstract "entanglement" argument is also out of joint with our entire social development. As this Court has repeatedly recognized, the expansion of government in a compressing metropolitan society leaves no citizen or institution untouched or uninvolved by pervasive government supervision and regulation. To out-law church-related schools from such contacts would effectively place them beyond the ken and reach of necessary government involvement, and destroy their ability to survive, along with other non-profit institutions an charities, in an environment that is, of necessity, shot through with government relationships and involvements. Thus the Appellants' entanglement argument, advanced in the name of neutrality, is far from

neutral, but clearly hostile to the opportunities and rights of non-public school children and their parents.

Appellants' reference to the "purchase of services" method of administering Act 109 as a cover for unconstitutional action between church and state, will not stand scrutiny. A great bulk of Pennsylvania's entire welfare administration rests upon its traditional pattern of purchase of services. The pattern is by no means confined to the state of Pennsylvania. It is the same pattern employed by the Federal Elementary and Secondary Education Act, (20 U.S.C. 883 (b)). As most recently amended, that Act provides:

> "1. General Authority.
>
> Delegation of Authority; Utilization of other Agencies
>
> Section 411. (a) ***
>
> b. In administering any applicable program, the commissioner is authorized to utilize the services and facilities of any agency of the Federal Government and of any other public or non-profit agency or institution in accordance with appropriate agreements, and to pay for such services either in advance or by way of reimbursement, as may be agreed upon." See Conference Report, March 24, 1970 on Elementary and Secondary Education Amendment of 1969, H.R. Report No. 91-937, 91st Cong., 2nd Session, P. 50.

The absurdity of the Appellants' entanglement argument is thus revealed in the extermity of its implications which would outlaw not only Act 109, but, a fortiori, the federal education aid laws and the host of state

welfare laws. Such a destructive view of the Establishment Clause, both of the social welfare and of the liberty of church-related institutions and their supporters, is not entitled to serious consideration.

The Appellants' argument on church-state involvement, rhetorically described as "entanglement", also suffers from an inner inconsistence. They would appear to have the law work in two contradictory ways, but always against the interests of church-related education. First, they recognize that non-public schools serve a public function, meet the public interest in secular education, and are therefore properly subject to state supervision and regulation of their secular educational programs. Nevetheless, they would deny that these same schools perform secular educational functions as to qualify for state assistance. Thus, church-related schools which are recognized as qualified schools under general educational law, become, in Appellants' view, religious institutions under constitutional law, and not schools for secular education, as well as religious instruction. The construction of this strange legal antithesis by generalizations about "entanglement" of church and state cannot be given balance by the mere fact that state financial assistance is rendered to advance secular education, for the degree and nature of "entanglement" between state involvement to insure proper secular education without assistance, and similar involvement for similar purposes with assistance, are distinctions without constitutional differences.

CONCLUSION

The City of Pittsburgh believes that Act 109 is constitutional on its face with respect to all non-public schools, including church-related schools, in that it advances an unquestionably secular legislative purpose and has a clear primary effect that neither advances nor inhibits religion. As to this conclusion, and all other conclusions reached by the court below, the City believes and requests that the judgment below should be affirmed.

Respectfully submitted,

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RESOLUTION

WHEREAS, the Council of the City of Pittsburgh deems it in the best interests of the City that it support the position of the granting of aid to private schools;

NOW, THEREFORE, BE IT RESOLVED, That the City Solicitor, on behalf of the City of Pittsburgh, is hereby directed to file an amicus curiae brief in the case of *Lemon et al v. Kurtzman et al,* No. 1189* October Term, 1969,* Supreme Court of the United States, in support of the position of aid to private schools.

In Council August 6, 1970, read and finally passed.

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* (as written)

AUG 24 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

BRIEF OF POLISH AMERICAN CONGRESS, INC., ORDER OF SONS OF ITALY IN AMERICA, UKRAINIAN NATIONAL ASSOCIATION, INC., LEAGUE OF UNITED LATIN AMERICAN CITIZENS, SLOVAK CATHOLIC FEDERATION OF AMERICA, CROATIAN CATHOLIC UNION OF U.S.A., AMERICAN SLOVENIAN CATHOLIC UNION, LITHUANIAN ROMAN CATHOLIC ALLIANCE OF AMERICA, HUNGARIAN CATHOLIC LEAGUE OF AMERICA, INC., ANCIENT ORDER OF HIBERNIANS IN AMERICA, INC., GREEK CATHOLIC UNION OF THE U.S.A., UNION SAINT-JEAN-BAPTISTE, CATHOLIC CENTRAL UNION OF AMERICA, UKRAINIAN WORKINGMEN'S ASSOCIATION, AND POLISH ROMAN CATHOLIC UNION IN AMERICA, AMICI CURIAE

(Signatures on Page 2 of Cover)

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IN THE

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OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

BRIEF AMICUS CURIAE OF POLISH AMERICAN CONGRESS, SONS OF ITALY, ET AL.

INTEREST OF THE AMICI

The *amici curiae* are as follows:

Polish American Congress, Inc. The Congress is a national body, founded in 1944, and representing fourteen organizations whose one million members are of Polish descent. Its headquarters are in Chicago, Illinois. The organization has had a prime interest in promoting education and democratic citizenship.

Order of Sons of Italy in America. The Order embodies 80,000 active members in twenty states, who are persons of Italian birth or descent, regardless of religious faith. The Order has, among its purposes, the supporting of education, civic virtue, and other humanitarian goals, in addition to encouraging the dissemination of Italian culture in the United States. Founded in 1913, the national headquarters is at Philadelphia, Pennsylvania.

Polish Roman Catholic Union of America. The Union is a fraternal organization, founded in 1873, having a membership in excess of 150,000 in 23 states, consisting principally of persons of Polish origin who are of the Roman Catholic faith. Among PRCUA's prime aims, is, and has been, the promotion of Americanism, good citizenship and the sound education of the young. Its principal office is at Chicago, Illinois.

Ukrainian National Association, Inc. Founded in 1894, the Association is a nonsectarian benevolent society consisting of 90,000 members in 460 branches in 29 states and the District of Columbia. Membership is open to any person of Ukrainian or other Slavic extraction. The organization fosters knowledge and preservation of Ukrainian culture and the cause of human freedom. It has always taken a special interest in education. Its headquarters is in Jersey City, New Jersey.

Ukrainian Workingmen's Association. Organized in 1910, UWA, a secular organization, has 24,000 members in seven states. Affording a variety of programs aimed at service to the community and the promotion of brotherhood and American patriotism, it has rendered extensive support to scientific, educational, civic and charitable work, in addition to its fostering of knowledge of Ukrainian history and culture. Its principal office is in Scranton, Pennsylvania.

Slovak Catholic Federation of America. The Federation consists of: First Catholic Slovak Ladies Association,

ennsylvania Slovak Catholic Mens Union, Pennsylvania lovak Catholic Womens Union, The Catholic Sokols, and ie Wreath of the Free Eagle—the total membership being 80,000 persons. Organized in 1911, the Federation has xisted for many humanitarian purposes—among these the nprovement of social conditions among persons of Slovak xtraction and promoting works of education and of charity. t has its national headquarters at Munhall, Pennsylvania.

Croatian Catholic Union of U.S.A. The Union is a raternal society, with a membership of 15,000 persons of roatian extraction in sixteen states. Founded in 1921, it arries on extensive cultural activities. It promotes respect or the independence of the United States of America and as as a specific aim the promotion of education. Its na- ional headquarters is located at Gary, Indiana.

American Slovenian Catholic Union. The organization onsists of 50,000 members in twenty states who are of lovenian origin or descent. It was founded in 1894 as fraternal society and has been active in charitable and ducational endeavors. Its headquarters are at Joliet, llinois.

Catholic Central Union of America. Founded by Amer- cans of German origin in 1855, the organization (no longer "nationality" body) promotes education and works of harity and the protection of civil and religious liberty of itizens. It has a membership of 25,000 in the United States. Its national office is at St. Louis, Missouri.

League of United Latin American Citizens. This or- ganization was founded in 1929 to promote good citizen- hip and service to the country. It has a membership of 150,000 persons, of Mexican origin or relationship, in six- teen states. Its main office is at Laredo, Texas.

Union Saint Jean-Baptiste. Founded in 1900 for bene- ficial, charitable and educational purposes, the Union now has a national membership of 55,000 persons of French origin. Its headquarters is in Woonsocket, Rhode Island.

Greek Catholic Union of the U.S.A. This organization, with a membership of 50,000 persons of Slavonic extraction, was founded in 1893 for a number of humanitarian (including educational) purposes. It is based in Pittsburgh, Pennsylvania.

Lithuanian Roman Catholic Alliance of America. Related to the cultural and educational needs of citizens of Lithuanian ancestry or origin, the Alliance, with national headquarters at Wilkes-Barre, Pennsylvania, was founded in 1886 and today has 8,000 members.

Ancient Order of Hibernians in America, Inc. The Order is a fraternal order, with a national membership of 250,000, devoted to promoting the welfare of individuals of Irish descent in America. It has long fostered an interest in education. Its headquarters is in Indianapolis, Indiana.

Hungarian Catholic League of America, Inc. The League is a fraternal and charitable organization of persons of Hungarian descent. The League has long been active in promoting freedom of education. It has a national membership of 100,000. Its principal office is in New York, New York.

The organizations submitting this brief have a collective membership of two million persons. Indirectly they represent many more millions of persons of European origin or ancestry. Residing chiefly in the great urban centers and industrial cities of the United States, these organizations have long engaged in efforts for the betterment of social conditions of the foreign born, the promotion of the principles of American citizenship, and the enrichment of American life through the contribution of cultural traditions of other lands. While these "ethnic" Americans can be found in various social-economic strata, a large number of them help constitute the backbone of the Nation's labor force.

The *amici* organizations have a vital and substantial interest in education, both public and nonpublic. As tax-

payers, their members faithfully fulfill their duty under law to contribute to the support of the public schools in their states. Many of these citizens have children enrolled in those schools, while many others of them, in the exercise of a fundamental liberty to choose non-state education, have children enrolled in nonpublic schools.

The *amici* organizations have never before come together nationally to present a brief to this Court. They now do so because the meaningful enjoyment of fundamental liberty in education is plainly at stake in this litigation.

SUMMARY OF ARGUMENT

The *amici* believe Pennsylvania's Act 109 to be constitutional. Only one question raised by Appellants is of any substance: whether the Act, on its face, is a law respecting an establishment of religion. It is clear that, measured by the principles which this Court has laid down in *Board of Education* v. *Allen*, 392 U.S. 236 (1968) and *Walz* v. *Tax Commission*, —— U.S. ——, 25 L. Ed. 2d 697 (1970), the Act does not violate the Establishment Clause. While the Act has no effect of advancing religion, it does serve the vital public purpose of advancing the secular education of the young. The fact that the Act does this through nonpublic institutions (including those which are religiously related) is a prime reason *for* its constitutionality: *the Act promotes educational, cultural and religious freedom.*

ARGUMENT

I. ACT 109 IS A POSITIVE AID TO EDUCATIONAL, CULTURAL AND RELIGIOUS FREEDOM

The Appellants seek to create a myopic focus upon the Act: it is invalid simply and solely because of the religious relationship of the publicly accredited schools which may participate under it. Thus the Appellants seek to deflect all attention from what is one of the most obvious of all the vital contributions of the Act: namely, to aid

human freedom in its intellectual, cultural and religious dimensions.

Parents have a right, under the Constitution to expose their children to religious and cultural values of their own choosing:

> "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to prepare him for additional obligations." *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925).

The First Amendment is the legal basis of that right, and "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas* v. *Collins,* 323 U.S. 516, 530 (1944). To maintain otherwise would be to grant to public officials, *in principle,* unthinkable powers of ideological and cultural formation of children. The concept of equality of educational opportunity has been often—and properly—seen in terms of freedom of opportunity to be admitted to public schools. That is not, however, the whole scope of freedom of educational opportunity. A vital aspect of that freedom is the *meaningful* opportunity to choose nonpublic schools.

The "ethnic" groups in the United States not only support public education; they have indeed been major contributors to the building of the public school system in the United States. They have, moreover, never aligned themselves with those who have fostered racism, whether in public education or otherwise. But they are peculiarly

aware of the long campaign which has been prosecuted, even to this hour, through immigration quotas, through discrimination in employment and housing, and through political pressures relating to education, to promote a *pseudo* "American culture" in which "foreign influences" and indeed religious integrity are discouraged. The statute struck down by this Court in *Pierce, supra,* was the result of a campaign to "Americanize" education in Oregon launched in 1920 by the Imperial Council, A.A.O. Nobles Mystic Shrine and certain related groups. Their purpose was stated on the official ballot when the compulsory education bill was before the electorate. The sentences are instructive at the present hour:

> "Our nation supports the public school for the sole purpose of preservation.
>
> "The assimilation and education of our foreign-born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.
>
> "We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.
>
> "Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American." Oregon School Cases Complete Record, 732 (1925).

The most extensive and learned brief *amicus curiae* to be filed in the *Pierce* case was that written by Louis Marshall on behalf of the American Jewish Committee. He expressed his fears as to what the practical results might be of state absorption of all education:

> "Recognizing in the main the great merit of our public school system, it is nevertheless unthinkable that public schools alone shall, by legislative compulsion

> rather than by their own merits, be made the only medium of education in this country. Such a policy would speedily lead to their deterioration. The absence of the right of selection would at once lower the standards of education. If the children of the country are to be educated in accordance with an undeviating rule of uniformity and by a single method, then eventually our nation would consist of mechanical Robots and standardized Babbitts." *Id.* at 615.

But the most trenchant criticism of the statute and of the philosophy of those who defended it Marshall reserved for the conclusion of his brief. The point is most pertinent in view of charges made today that church-related schools are "divisive". Backers of the statute had stated:

> "Our children must not under any pretext, be it based upon money, *creed* or social status, be divided into antagonistic groups, cliques or cults there to absorb the *narrow views of life* as they are taught." *Id.* at 621. (Emphasis supplied).

This view Marshall castigated:

> "Here those who send their children to private and parochial schools because of their creed are charged with constituting antagonistic groups and as absorbing 'narrow views of life'. In other words, parents who are anxious for the future welfare and happiness of their children, and who seek to dedicate them to moral, ethical and religious principles, are denounced for sending their children to private and parochial schools, because, forsooth, the views of life which they there absorb are characterized as 'narrow'.
>
> "What does that mean but an attempt on the part of the protagonists for this law to sit in judgment upon their fellow-citizens whose ideals differ from theirs! How does such a mental attitude differ from that which prevailed when governments sought to enforce uniformity of religious beliefs and punished nonconformists as criminals?" *Id.* at 621, 622.

Almost a half century later, this debate of 1925 is revived in the instant proceeding. Today, vast changes have taken

place in the role of government in this country, in the dimensions of governmental spending, and in personal taxation. The arguments once used in an attempt to employ statutory law as a direct weapon to coerce all parents to accept public education for their children are now used in an attempt to employ the law of the Constitution as a similar weapon. The position of many parents would then come to this: (1) the state's compulsory attendance law requires that children be placed in schools—public or nonpublic; (2) many parents, due to no other cause than conscience, wish to have their children educated in nonpublic schools; (3) the combined effect of inflation and of the state's taxation is rendering the choice of a nonpublic school meaningless; (4) partial state aid to nonpublic education, very carefully limited to secular instruction and under sound public controls is (under such views as Appellants urge) constitutionally impermissible. The end result would be that these parents would enjoy educational liberty in nothing but theory and be denied it in actual fact.

This denial of true educational opportunity is seen most clearly when serious consideration is given to the public interest dimension in education. Educational pluralism* is essential to the welfare of the state itself. While much scholarly opinion has advocated educational pluralism as a useful means of providing relief from the alienation and

---

* The term, "pluralism", as used herein, does not encompass the bogus "pluralism" advanced under the banner of a supposed "freedom of choice", by advocates of racial segregation. Act 109, read in conjunction with other applicable Pennsylvania law, does not permit the schools participating thereunder to exclude or discriminate against anyone. See Appendix in this case, pp. 72-77. The *amici* organizations, which have been leaders in fighting discrimination and in promoting good citizenshp, strongly discountenance any legislation which would be aimed at promoting havens for racism. In this connection it should be pointed out that nonpublic schools have played an important role in stablizing many neighborhoods in difficult transitional times.

bitterness marking contemporary American society,* or purely educationally in allowing for differing instructional approaches to children of unique background,** or as furnishing a better opportunity for humanism in education as opposed to emphasis upon technical competence,*** or as providing more effective acculturating agencies in American society,**** it is plain that the most vital function of educational pluralism is in the fostering of freedom of conscience. Nonpublic schools have historically played a significant role in America in nurturing religious freedom. They have, in fact, constituted an example of it. Today they become essential to religious liberty as the only channels of general education wherein the *right to receive* religion may be realized. Many parents hold the view that an educational environment which is religiously neutral is not acceptable to their children. Many commentators are of the view that no religious neutrality is possible in any general process of the educating of the young.* For those whose conscience demands religious schooling, the nonpublic school, with its dual function, is indispensable. Public aid to nonpublic education poses no threat to a public educational system worthy of public confidence. Indeed aid such as that afforded to nonpublic education under Act 109 serves public education not only financially by helping

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* See Cleary, *Are We Encouraging Political Cynicism in Our Schools?* 51 PHI DELTA KAPPAN 549-553 (June, 1970).

** See Stodolosky and Lesser, *Learning Patterns in the Disadvantaged*, HARVARD EDUCATIONAL REV. (Fall, 1967) pp. 546-593; L. Thompson and A. Joseph, THE HOPI WAY (1944).

*** See F. Littell, *Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?* in Erickson, PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS, 73, 81 (1969).

**** See W. Warner and L. Srole, THE SOCIAL SYSTEMS OF AMERICAN ETHNIC GROUPS (1945).

* M. Konvitz, RELIGIOUS LIBERTY AND CONSCIENCE, 51-72 (1968); W. Ball, *Religion and Public Education: The Post-Schempp Years*, in Sizer, RELIGION AND PUBLIC EDUCATION, 144-163 (1967).

retard the economically forced transfer of large nonpublic school populations to the public schools, but also by providing a creativity in education beneficial to all schools. Nor is any fragmentation of society spurred by legislation such as Act 109. America has long had a large segment of its population in nonpublic schools. The record shows that the graduates of these schools have been contributors at all levels of society and that the nonpublic schools have been a unifying influence in a society which has not yet fallen prey to the illusion that a state educational monopoly creates social unity. American history, as the *amici curiae* are particularly qualified to testify, reveals that the unity of American society has always been found, not in the suppressing of cultural and religious diversity, but in the harmonious living together and working together of individuals and groups in all of their essential distinctiveness.

II. PENNSYLVANIA'S ACT MEETS THE TEST OF HAVING (A) A SECULAR LEGISLATIVE PURPOSE (B) NO PRIMARY EFFECT THAT ADVANCES RELIGION

In *Allen* this Court restated the test it had pronounced in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), that legislation, to withstand the strictures of the Establishment Clause, must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion". *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968).

a. The Act's Stated Secular Purposes Are Realized in Its Operation

Act 109 was declared by the Pennsylvania General Assembly, which enacted it, to be directly responsive to the educational crisis in that state. While the Appellants attack the good faith of the legislature in making that declaration, any further question of the public purposes of the Act has been foreclosed by the subsequently published report of the Pennsylvania Department of Education show-

ing the achievements, on behalf of education, realized by the Act following two years of actual operating experience under it. The Department's report released July 1, 1970, states, in part:

> "Relative to the second conclusion, we have been apprised by both the nonpublic school administrators and various interested citizens and organizations of the Commonwealth regarding the substantial educational advance which this epochal program has marked. Because of the quality incentives and program stimulation written into PNESEA, evidence of upgraded nonpublic education in some needed instances has been noted resulting in much favorable comment."

The rational basis for, and correctness of, the legislature's declaration of purpose is also seen in the fact that, as the third year of operation of the Act begins, the Commonwealth has afforded aid to around 500,000 children per year, for two years, by supporting their instruction in the basic fields of mathematics, modern foreign languages, physical science, and physical education. It is wholly incorrect to say, as do Appellants, that the state does not really aid education by paying for instruction under the Act. The Act specifically requires of the participating nonpublic schools conformance to a standard not even required of the public schools: the attainment of a satisfactory level of pupil performance in the supported subjects. That such attainment is written into the Act as a condition precedent to payment is proof that, with respect to all the reimbursed schools, the state is in fact supporting education—indeed, education of good quality.

Thus, the Court may find the secular legislative purpose of the Act, not merely in legislative declaration, but in the Act's purpose-as-achieved in actual operation in Pennsylvania.

b. The Act Does Not Advance Religion

The Act falls clearly within the constitutional pattern upheld in *Allen*. If Act 109 violates the Establishment Clause, so did the New York Textbook Loan Act. Constitutionally, there is no difference between the two pieces of legislation, unless it be said that Act 109 is closer to the non-establishment principle than was the New York act. While Appellants seek to escape the effect of the *Allen* decision, they are driven to technical distinctions which do not result in constitutional difference:

1. Act 109 provides funding; the New York act provided only books. Several comments upon this point will reveal that it is insubstantial. First, the Appellants' insistence upon a strict "no aid" doctrine means that the form of aid makes no difference: any benefit to *or through* a church-related institution is forbidden. The New York act provides benefits costing the state in excess of $5 million per year. Second, a grant of physical property can be more of a benefit to the donee and more of a detriment to the donor than a grant of money. Third: there is really not a grant under Act 109, but only reimbursement: the nonpublic school actually makes the only "grant" involved; that it recoups from the state upon satisfaction of the conditions stated.

2. Act 109 benefits institutions; the New York act benefited only children and parents. This is the shallowest of all the Appellants' arguments. This, as the court below correctly stated, places form over substance. The Court, in *Allen*, after describing the program, went on to say: "Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to the schools". 392 U.S. at 243, 244. At the end of this sentence the Court appended a footnote which pointed out that under the New York program, private schools were permitted to store the books on their premises, and that it was these schools (and not the children) which presented

the requests for the books to the Board of Education. The Court, in its footnote, concluded: "So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request." 392 U.S. at 244. This seems to mean either: (a) that if it can be shown that the student ultimately benefits, it is not material that he receives the benefit through the institution he attends, or (b) that the critical question is whether there was an act, upon the individual student's part, of asking for the book in a formal manner, and a furnishing of the book to him, individually, in response to that request. This latter meaning appears untenable. First, it qualifies the basic concept of the *Allen* test: if it can be proved that education of the student was advanced through the legislation in question, how material is it that he went through the motions of a request? The fact of request can obviously have no bearing upon the question of whether his education was advanced.

Did the Court intend to imply that any program whereby funds or books or financial benefit went to a school, would be unconstitutional? To say that the *Allen* test is met only in the circumstance in which the "child", or "student", or "individual", has been, in some formal way, an earmarked beneficiary, and in which the institution has, so to speak, dematerialized, and appears to play no role in the process of education (which is, after all, the process being supported by the legislation) seems unrealistic.

The decision of the Court as well as its essential rationale, are inconsistent with such view. First, the Court plainly focused upon the presence, in the case, of religious institutions—saying that the program in question did not provide "an unconstitutional *degree of support*" therefor. 392 U.S. at 244. Secondly, as has been noted, the Court recognized the role of these institutions, not only as partial administrators of the program of

publicly-supplied benefits, but as custodians thereof. Thirdly, the Court pointed out that these publicly-supplied benefits (the books) "are critical to the teaching process". 392 U.S. at 245. Fourthly, it specifically stated that "parochial schools" perform the task of "secular education", a task which from the context, the Court clearly saw as lying in the public interest. 392 U.S. at 247.

3. Act 109 involves grants; the New York act involved only loans. This also fails as a meaningful distinction. The plaintiffs in *Allen* attacked the New York act as providing for a "permanent loan", which they said was no different from a grant. As has been seen, Act 109 involves no grant but instead reimbursement, or payment by the state of contract debts.

4. Act 109 involves teacher salaries; the New York act involved only textbook cost. The plaintiffs in *Allen* (who are substantially the same plaintiffs as in this case) attacked the New York program as an aid to one inseparable teaching process, in which book and teacher were all one instrumentality. They thus attacked the New York program as in fact a teacher-support program. The Court upheld the program, stating that it could not hold, as a matter of law, that all teaching in a religiously-affiliated school is sectarian. Absent proof, it would in fact assume that there is teaching in such schools which is *secular*—not sectarian. It recognized, in other words, the secular function of such schools. Now, if there is *teaching* in these schools which is secular (and thus publicly supportable), does that function become non-supportable because of the *profession* of the teacher—a private and personal commitment which that teacher has made? To affirm such a proposition would plainly be to attack the citizenship of such teacher, because then, *not the function which she performs but the fact of her religious profession*, becomes the sole test of her eligibility to participate in a public program. Such a proposition would deny qualification to

any ordained minister or rabbi teaching in a public school (of whom there are many). The very notion is abhorrent.

It is clear that if the New York program upheld in *Allen* did not violate the Establishment Clause, neither does does Act 109.

The Appellants' assertion that Act 109 advances religion (and indeed that that is its primary effect) can be viewed as nothing less than an argument in favor of an *establishment of secularism.* Their essential position is this: that no public funds may be expended to aid *any* function—secular though the function may be—where the agency performing that function is religiously related. This position has a two-pronged effect: *first,* it would economically wipe out the contribution of all church-connected social service institutions; *second,* it would substitute a regime of secularism in all welfare (including educational) work.

CONCLUSION

It is submitted that Pennsylvania's Act 109, a statute useful to educational progress, serves vital public purposes and in no wise offends the Constitution of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL MEMORANDUM FOR APPELLEES IN LEMON v. KURTZMAN IN RESPONSE TO MEMORANDUM FOR APPELLEES IN ROBINSON v. DICENSO, NOS. 569, 570, OCTOBER TERM, 1970

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On August 5, 1970 and August 10, 1970, Appellees Kurtzman and Sloan (Commonwealth of Pennsylvania) and Appellee Schools in *Lemon* v. *Kurtzman*, respectively submitted their briefs in chief. On September 9, 1970, Appellees in the case of *Robinson et al.*, v. *DiCenso, et al.*, Nos. 569, 570, October Term, 1970, filed a "Memorandum for Appellees" which, at pp. 2-3, specifically deals with the instant case.

The Appellees Kurtzman and Sloan and Appellee Schools in *Lemon* v. *Kurtzman* now submit this Supple-

mental Memorandum pursuant to Rule 41 (5) of the Rules of the Supreme Court of the United States which permit a party to file a supplemental brief respecting "... other intervening matters that were not available in time to have been included in his brief in chief ..." and intend this Supplemental Memorandum to be responsive to the "Memorandum for Appellees" filed in *DiCenso*.

The *DiCenso* Memorandum suggests to the Court that *DiCenso* be heard (and thus considered) together with the *Lemon* case. The Memorandum thus implies that the *DiCenso* and *Lemon* cases are generally similar in nature, and even goes so far as to contend that *DiCenso* "presents a more appropriate case for determination of the issues than the *Lemon* case" because of the trial and factual determinations relating to the operation of Rhode Island Schools and the Rhode Island statute.

The *DiCenso* Memorandum is inaccurate in characterizing these cases as similar and is unsound in its reasoning that *DiCenso* is a better vehicle for constitutional adjudication of a nationwide issue than *Lemon*.

1. For the reasons set forth in the Brief for Appellee Schools (pp. 16-24) in *Lemon* v. *Kurtzman*, the posture of this case makes it ripe for adjudication by this Court. The *Lemon* case presents *a clear-cut issue of law* regarding the constitutionality of the Pennsylvania statute *on its face*. The holding in *Lemon* would apply to all similar statutes regardless of variations in statutory application, in school practices or in disputed fact finding from state to state.

On the contrary, the *DiCenso* decision was limited to a resolution of the Rhode Island statute *as applied* to a limited number of schools in that state. The trial and factual determinations of the operation of the

Rhode Island statute in *DiCenso* render that case peculiarly inappropriate for adjudication of the nationwide issue, because it deals exclusively with the Rhode Island situation.

The *DiCenso* case relates only to Catholic schools as they are operated in the State of Rhode Ihland. This is to be contrasted with the broad and diverse mix of schools involved in *Lemon,* as is evidenced by the parties and pleadings in this case. These schools include private schools, schools of differing sects, as well as nondenominational schools.

It is clear, therefore, that this Court cannot determine a purely square issue of law of facial constitutionality of a statute, as presented to the Court in *Lemon,* by a consideration of facts peculiar to the operation of another statute, as presented to this Court in *DiCenso.*

2. A brief comparison of the statutes involved in the two cases will demonstrate that the two cases are not similar:

(a) The stringent constitutional safeguards imposed by the statute in *Lemon,* as compared with the statute in *DiCenso,* reveal crucial differences in the two cases. Section 5603 (3) of the Pennsylvania statute expressly excludes from reimbursement by the state "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

No such clear-cut limitation to the secular function is provided by the statute in *DiCenso.* The Rhode Island statute neither defines nor limits the categories of aid beyond "those subjects required to be taught by state law, to the same extent as those subjects are taught in public schools, or which are provided in public schools." (Section 16-49-2(2)). This broad prescription, involving a broad class of many subjects with

potentially complex and varying administration problems, may be compared with the categorical limitations in the narrow provisions of the Pennsylvania statute (Section 5604) which is limited to four defined categories of markedly non-value-related subjects, all of which are prime public-interest areas whose priority is recognized in the National Defense Education Act: Mathematics, Modern Foreign Languages, Physical Science, and Physical Education.

(b) The Rhode Island statute places private school teachers directly on the public payroll without corresponding provisions normally governing public employees. The Pennsylvania statute contains no such undertaking by the state and does not pay teacher salaries. It provides for reimbursement to a school of a state-audited instructional cost, of which only that portion of teacher services allocable to one or more of the four subjects is a part.

(c) The Rhode Island statute may be interpreted to imply (Section 16-49-1) a duty on the part of the state, for parity of support as between nonpublic and public education (reciting that the state has a duty to provide "a quality education for all . . . youth, those in public and nonpublic schools alike"). By contrast the Pennsysvania statute does not express or imply such duty, but is based on the *Everson-Allen* principle that it is *permissible* (but not mandatory) for a state to afford aid to secular functions of church-related schools.

Appellees Kurtzman and Sloan and Appellee Schools in the instant case take no position as to whether the Court should note probable jurisdiction in the *DiCenso* case, or whether the Rhode Island statute is constitutional or unconstitutional. Appellees Kurtzman and Sloan and Appellee Schools do contend, however, that the *DiCenso* and *Lemon* cases are separate and distinct

cases raising separate and distinct issues, and that the statute in the *Lemon* case should be considered by this Court solely on its own merits, apart from the *DiCenso* case.

Appellees Kurtzman and Sloan and Appellee Schools further contend that the adjudication of the *Lemon* case should not in any way be beclouded by any joinder or proximity of the oral argument in *Lemon* with the oral argument, if any, in *DiCenso*.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., APPELLANTS

v.

DAVID H. KURTZMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the district court (App. 78–112) are reported at 310 F. Supp. 35.

JURISDICTION

The order of the district court was entered on November 28, 1969 (App. 100). The notice of appeal was filed on December 17, 1969. Probable jurisdiction was noted on April 20, 1970. 397 U.S. 1034. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 Pa. Stat. Ann (1970 Cum. Pocket Part) §§ 5601, *et seq.*, is reproduced in full at App. 18–25.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Pennsylvania Nonpublic Elementary and Secondary Education Act, under which the State reimburses religiously-affiliated private schools for teachers' salaries incurred and textbooks and instructional materials used in teaching secular subjects, violates the Establishment Clause of the First Amendment, which applies to the States under the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources. Consonant with this Court's decision in *Pierce* v. *Society of Sisters,* 268 U.S. 510, it is also its policy to respect the rights of parents to send their children to a religiously-affiliated school that they believe best meets their children's needs.

In his message on Educational Reform on March 3, 1970, the President stated:

The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The non-public schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand non-public elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion

per year in operations, with an estimated $5 billion more needed for facilities. [H. Doc. No. 91–267, 91st Cong., 2d Sess., p. 9.]

Congress previously had taken steps in furtherance of this policy. Title II of the Elementary and Secondary Education Act, 20 U.S.C. 821, *et seq.* (enacted in 1965), provides for grants to states for the acquisition of books and instructional materials for the use of children and teachers in public and private (including religiously-affiliated) elementary and secondary schools. Although there are distinctions between the type of government aid under the latter statute and that under the Pennsylvania program,[1] the same constitutional principles govern the validity of both programs. For this reason, and also because the Pennsylvania program furthers the federal policy of improving the quality of private as well as public education, the United States is filing this brief *amicus curiae* in support of the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act.[2]

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[1] The constitutionality of Title II of the federal Act is presently pending before the United States Court of Appeals for the Sixth Circuit in *Protestants and Other Americans United for the Separation of Church and State* v. *United States* (No. 20, 270).

[2] Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. 701–758, provides for federal grants to assist colleges and universities in constructing certain types of academic facilities. The question whether the Act authorizes such grants to church-related institutions and, if it does, whether it is constitutional, is before the Court in *Tilton* v. *Richardson*, No. 153, this Term.

STATEMENT

This is a suit to enjoin enforcement of the Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 Pa. Stat. Ann. §§ 5601, *et seq.*, on the ground that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (App. 15). The plaintiffs are individual citizens and taxpayers of Pennsylvania (one of whom, appellant Lemon, also is the parent of a Negro child attending a Pennsylvania public school), various religious and educational organizations, and a Pennsylvania affiliate of the National Association for the Advancement of Colored People (App. 9–10). The defendants are the Superintendent of Public Instruction and the Treasurer of Pennsylvania, and various Pennsylvania religiously-affiliated schools.

The statute rests on legislative findings that an educational "crisis" exists in both the state and the nation, due to rapidly increasing school costs; and that nonprofit schools further the public interest in educating the young, relieve the state of the financial burden of educating more than 20 percent of all pupils in Pennsylvania, and enhance the liberty of parents to choose the type of school they wish their children to attend. 24 Pa. Stat. Ann. § 5602. In order to assist in meeting increasing educational costs, the state educational authorities are empowered to contract with private schools to purchase "secular educational services," including teachers' salaries, textbooks and educational materials (§ 5604). Reimbursement for these services may be made only for courses in mathematics,

modern foreign languages, physical science, and physical education (*ibid.*); reimbursement is prohibited for any course containing "any subject-matter expressing religious teaching, or the morals or forms of worship of any sect" (§ 5603). Textbooks and instructional materials provided under this program must be approved by the state Superintendent of Public Instruction (§ 5604). In order to qualify for reimbursement, a school must demonstrate that "a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction" has been obtained.[3] *Id.*

The defendants moved to dismiss on the ground, *inter alia*, of failure to state a claim (App. 35–38, 55–56).[4] A three-judge district court (Circuit Judge Hastie dissenting) held that the statute does not violate the Establishment Clause (App. 78–112). The court ruled that the statute has the secular purpose of advancing the education of the state's children in secular subjects and that the statutory safeguards are sufficient to assure that it does not have the effect of furthering religion (App. 88–98).[5]

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[3] Five years after the effective date of the Act, teachers not in service on its effective date must have a certification equivalent to that of teachers in public schools (§ 5604).

[4] The schools also sought dismissal on the ground of lack of standing (App. 27–34). The court unanimously held that the individual plaintiffs had standing to raise the First Amendment challenges to the Act but not the Fourteenth Amendment issue, and that the organization plaintiffs had no standing to challenge the Act (App. 84–88).

[5] The court also held that since there was no allegation of any coercive effect of the Act on the practice of the plaintiffs' religion, it did not offend the Free Exercise Clause (App. 99).

ARGUMENT

THE PENNSYLVANIA STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE ITS PURPOSE AND EFFECT ARE TO IMPROVE SECULAR EDUCATION AND IT DOES NOT SUPPORT OR ADVANCE RELIGION.[6]

INTRODUCTION AND SUMMARY

In its most recent decision dealing with state aid to religiously affiliated private schools, *Board of Education* v. *Allen*, 392 U.S. 236, 243, this Court reaffirmed the test, originally announced in *Abington School District* v. *Schempp*, 374 U.S. 203, "for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits":

> what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education* * * *.

In *Allen*, the Court held that under this test a New York statute providing for the free lending by local school authorities of text books to all students in cer-

[6] To the extent that appellants still press their free exercise claims in this Court, they are insubstantial, for there is no suggestion that the Pennsylvania Act involves any coercion in the practice or exercise of religion. See *Board of Education* v. *Allen*, 392 U.S. 236, 248–249; *Abington School District* v. *Schempp*, 374 U.S. 203, 222–223.

tain grades, including those attending parochial schools, did not violate the Establishment Clause. Pointing out that there was no showing that "the necessary effects of the statute" are "contrary to its stated [legislative] purpose" of "furtherance of the educational opportunities available to the young" (392 U.S. at 243), the Court held that although free books may "make it more likely that some children choose to attend a sectarian school * * * [that] does not alone demonstrate an unconstitutional degree of support for a religious institution" (p. 244). The Court stated (pp. 247–248, fn. omitted) that this country's

> continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

On the record before it in the *Allen* case, the Court rejected the contentions that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. * * * Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion" (p. 248).

Last Term in *Walz* v. *Tax Commission*, 397 U.S. 664, the Court, in holding that tax exemptions granted by a state to churches do not violate the Establishment Clause, cautioned against "rigidity" in applying the concept of "constitutional neutrality" in the government's relationship with religion (p. 669). Such rigidity, the Court warned, "could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited" (*ibid.*). The applicable "general principle," the Court stated (*ibid.*), is that

> we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. * * *

The aid that Pennsylvania provides to religious schools under this statute consists of reimbursement payments for (a) textbooks and instructional materials and (b) teachers' salaries. For both categories, the statute provides careful safeguards to insure that the financial aid is given only for the teaching of secular subjects, and to prevent its being used for any course containing "any subject matter expressing re-

ligious teaching, or the morals of forms of worship of any sect" (§ 5603).

The validity of the state's reimbursing religiously-affiliated schools for the cost of secular books and teaching materials is, we submit, directly sustained by *Allen*. Although there are distinctions between the form of aid involved in *Allen* and that under the Pennsylvania statute, they are not significant because both statutes have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion" (*Allen, supra*).

Just as the textbooks involved in *Allen* were "different from [the] buses" involved in *Everson* v. *Board of Education*, 330 U.S. 1, upon which the Court relied in *Allen*, so teachers' salaries "are different from [books]" (*Allen*, 392 U.S. at 244). What *Allen* makes clear, however, is that the critical inquiry is not the particular form that the state aid to religiously-affiliated schools takes, but its "purpose and * * * primary effect." The purpose and primary effect of Pennsylvania's reimbursement for teachers' salaries, like those of its reimbursement for textbooks and teaching materials, is secular, and the statute neither "advances nor inhibits religion." 392 U.S. at 243.

A. TEXTBOOKS AND INSTRUCTIONAL MATERIALS

The New York statute involved in *Allen* required local school boards to purchase textbooks and lend them without charge to children attending public or private schools, including church-related schools, that complied with the State's compulsory education law.

Such aid was restricted to books "designated for use in any public, elementary or secondary schools of the state or * * * approved by any boards of education" or other school authorities. 392 U.S. at 239. As previously noted this Court, in upholding the statute, emphasized that, in addition to their sectarian functions, church-related schools play an important role in the national system of secular education. 392 U.S. at 247–248. It pointed out that furthering "the educational opportunities available to the young" by providing them with textbooks was a valid, secular legislative purpose, even when such opportunities are extended to pupils in church-related schools. 392 U.S. at 243. "Perhaps," said the Court, "free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244.

The Court in *Allen* also ruled that the New York statute properly implemented this secular purpose. It pointed out that the statute gave the State full authority to insure that only secular books would be supplied; the furnishing of religious books was prohibited. "Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval." *Id.* at 244–245. It thus appeared that "books loaned to students are books that are not unsuitable for use in the public schools because of religious content." *Id.* at 245.

The Pennsylvania statute here involved similarly contains adequate provisions designed to assure that the materials for which the Commonwealth pays are used only for secular purposes. As in *Allen,* there is a flat prohibition on reimbursement for materials relating to "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." § 5603(3). Moreover, before making payment the public school authorities

> shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification approved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition. [§ 5604.]

The materials and the teachers who use them must thus meet the State's qualifications for public schools, and the pupils must demonstrate by test scores that the materials are being used to achieve the proper educational level.

Indeed, in two significant respects the guarantee of secular use of the materials is even stronger in the Pennsylvania statute than it was in New York.

First, New York permitted the loan of all "textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any board of education" without restriction to subject matter (*Allen,* 392 U.S. at 239). Pennsylvania, however, limits the areas for which reimbursement may be made to four subjects least amenable to the possible infusion of a sectarian viewpoint: mathematics, modern foreign languages, physical science, and physical education. § 5604.

Second, New York purchased the books and made them available to the religious schools, and relied on the assumption that the latter would fully observe the statutory restrictions upon their use. Pennsylvania, however, reimburses the schools for their costs of obtaining the materials, and to obtain reimbursement the schools must satisfy the State authorities that the materials were appropriate and were properly used:

> Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursemnt. [§ 5607(a).]

Thus, under the Pennsylvania statute the schools have the burden of showing that the materials were used for a secular purpose, and no funds may be dis-

bursed until they do so. If any of the materials were used for a religious purpose, the State would not pay for them.

The fact that under the *Allen* statute the State only loaned the books to the children whereas here the schools themselves purchase the books and then obtain reimbursement from the State, does not alter the basically secular character of the Pennsylvania program. The critical consideration is the same in both cases: the State has provided adequate guarantees that the materials will be used solely for secular purposes.

It is also immaterial, we believe, that the Pennsylvania statute provides a direct financial benefit to church-related schools whereas in *Allen* the benefit was provided indirectly, by supplying the books to the children who attend the schools. Although in *Allen* the Court stated that the benefit was "to parents and children, not to schools," 392 U.S. at 243–244, it subsequently pointed out that in *Allen*

> making textbooks available to pupils in parochial schools in common with public schools was surely an "aid" to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. [*Walz* v. *Tax Commission*, 397 U.S. 664, 671–672.]

Here, too, the fact that the State's payment for these materials may alleviate the financial burdens of religiously-affiliated schools does not render the Penn-

sylvania Act unconstitutional. Once again, the important fact is that the Act contains adequate provisions designed to limit the aid to the purely secular instruction in which the state has a strong interest. As we view the Pennsylvania statute—with its prohibition on any assistance for religious purposes; its scrutiny of the materials furnished, the qualifications of the teachers using them, and the results they achieve; its restriction of aid to four wholly secular subjects; and its procedures for auditing and payment only after the materials have been used for secular purposes—it contains assurances fully comparable to those in the New York statute that the materials given for secular purposes will not be diverted to unconstitutional uses.

B. TEACHERS' SALARIES

The validity of the State's reimbursement of salaries (or portions thereof) paid teachers for giving instruction in the four secular subjects for which reimbursement is permitted, presents a more difficult question. The problem of drawing the line between permissible and impermissible State aid to religious institutions "is one of degree" (*Zorach* v. *Clauson*, 343 U.S. 306, 314). Payment of salaries of teachers in religiously-affiliated schools may bring the State closer to "the line between state neutrality to religion and state support of religion" (*Allen*, 392 at 242) than providing buses and hot lunches and supplying secular books and educational materials. The Pennsylvania statute, however—with its carefully drawn limitations and protections designed to insure that State aid covers only se-

cular teaching in religiously-affiliated schools—does not cross the line into the constitutionally-forbidden area.

The problem is not that the easing of the financial problems of religiously-affiliated schools through government payment of teachers' salaries constitutes impermissible government aid to religion. As we have shown in the case of textbooks and instructional materials (*supra*, pp. 10–15), the provision of such a benefit does not automatically condemn the government's assistance. Rather, the problem stems from the danger that part or all of the government funds granted for teachers' salaries might in practice be used for teaching religion or religiously-oriented subjects. Unlike the case of books and instructional materials, however, where the State can examine the materials to insure that they are wholly secular, there is no comparable method by which the State can control the character of the teaching in the schools—unless the government undertook to monitor classroom instruction, an intrusion into the academic process that would itself pose serious constitutional problems. Cf. *Sweezy* v. *New Hampshire*, 354 U.S. 234.

Once again, the "test is inescapably one of degree" (*Walz*, 397 U.S. at 674); is the particular form of State aid to religiously-affiliated schools either "aimed at establishing, sponsoring, or supporting religion" or does it result in "an excessive government entanglement with religion" (*ibid.*)? As long as the particular State program reflects "a benevolent neutrality which would permit religious exercise to exist without sponsorship and without interfer-

ence" (*id.* p. 669), the constitutional requirement is satisfied.

There are no absolutes in this delicate area and the validity of government aid to religiously affiliated schools through payment of teachers' salaries must depend upon whether the particular program (1) has a religious rather than a secular purpose and (2) aids religion or improperly entangles the State in its propagation. As we now show, the Pennsylvania provisions for State reimbursement of teachers' salaries incurred in providing instruction in secular subjects violates neither of these standards and therefore does not contravene the Establishment Clause.

1. *The salary reimbursement provisions serve a secular purpose.* The purpose of the salary reimbursement provisions is as secular as that of the textbook and instructional materials provisions. In each instance, the legislature was seeking to improve the quality of secular education available to pupils in nonpublic schools. It found that rising costs and increasing demand for schooling constituted a threat to the quality of the education being offered to pupils who attend private schools. This Court recognized in *Allen* the validity of this concern: "if the State must satisfy its interest in secular education through the instrument of private schools [*Pierce* v. *Society of Sisters*, 268 U.S. 510], it has a proper interest in the manner in which those schools perform their secular educational function." 392 U.S. at 247.

The necessary implication of this conclusion, we believe, is that the State may pay for salaries neces-

sary to enable the schools to perform that function by instructing in secular subjects—provided this can be accomplished without undue involvement in the affairs of religiously-affiliated schools or sponsorship or endorsement of their religious principles. Pennsylvania's concern with maintaining and raising the standards of instruction in ~~church-related~~ religiously-affiliated schools is constitutionally permissible, and the means it has chosen to satisfy this concern—reimbursing the schools for teachers' salaries and conditioning that reimbursement on state-approved teacher certification—are not constitutionally forbidden.

The financial problems facing the religiously-affiliated schools in Pennsylvania, which the legislature found educate approximately 20 percent of all children in the State (App. 19; brief for appellee schools, p. 10), are serious. The legislature further found that "freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right," and that if a majority of the children now attending non-public schools in Pennsylvania were to shift to the public schools, "an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania" (App. 20). Pennsylvania religiously-affiliated schools thus are performing a vital role in providing secular education for a large portion of the children there, and insuring the high quality of that education is a valid State concern.

Certainly the state is not required to permit the quality of education in those schools to deteriorate to

the point where parents of children attending them must choose between abandoning the right to send children to schools of their own religious persuasion or the opportunity to obtain a quality education. Although government may not be required to include religiously-affiliated educational institutions in programs of financial assistance (see our brief in *Tilton* v. *Richardson,* No. 153, this Term), it is not barred from providing assistance to the secular functions of such institutions, where to do so furthers the religious freedom of those who choose to attend them. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission,* 397 U.S. 664, 673.

The Pennsylvania Act therefore rests on two related secular bases. First, since the state cannot compel attendance at public schools, *Pierce* v. *Society of Sisters, supra,* it may take appropriate steps to assure high standards in private schools, including the provision of financial aid. Second, it may do so where its action obviates the need for parents who wish a religious education for their children to sacrifice the quality of the secular instruction they receive in those schools.

Appellants, however, ask this Court to go behind the legislative statement of purpose to determine the "real" intent of the legislation. This Court wisely has consistently declined to examine into the motives of legislators. *United States* v. *O'Brien,* 391 U.S. 367, 383; *McGowan* v. *Maryland,* 366 U.S. 420, 496 (opinion of Mr. Justice Frankfurter); *Barenblatt* v. *United*

States, 360 U.S. 109, 132–133; *McCray* v. *United States,* 195 U.S. 27, 56. Motives are frequently mixed and the legislative process necessarily functions by compromises and accommodations that make the legislators' motives almost impossible to ascertain.

2. *The primary effect of the salary reimbursement provisions is not to aid religion or improperly to entangle the state in its propagation.* The Pennsylvania Act is narrowly drawn. It permits reimbursement for instruction only in four specified "secular" subjects, and secular is defined as "any course which is presented in the curriculum of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." § 5603(3). Thus, the courses for which reimbursement is permitted parallel those in the public schools, and reimbursement is precluded for any religious instruction.

Moreover, reimbursement is limited to four subjects which do not lend themselves to religious coloration: mathematics, modern foreign languages, physical science, and physical education. § 5604. The regulations under the Act further limit these subjects to avoid possible religious overtones. (See App. 94–95, nn. 16–19.) Physical science, for example, excludes biology (App. 94, n. 17); physical education excludes health instruction and sex education (App. 95, n. 19); and modern foreign languages exclude Latin and classical Hebrew and Greek (App. 94–95, n. 18). Pennsylvania has thus painstakingly sought to minimize any possible religious aspect to the teaching of these secular subjects.

The teacher certification and pupil testing requirements of the Act accomplish the same objective. Public certification indicates that a teacher in a religiously-affiliated school will have no lower professional qualifications than his colleagues in the public schools. Standardized testing provides a strong inducement for a religiously-affiliated school to maintain a high level of instruction in its secular courses—perhaps even conforming to the curriculum in the public schools—so as not to jeopardize its reimbursement by poor student performance on the examinations. The increasing demand for quality education, which the legislation reflects (§ 5602(1)), the narrow range of subjects for which reimbursement is allowed, and the certification and examination requirements of the Act combine to provide substantial assurance that the secular purposes of the Act will be observed. There is no more reason for assuming here than there was in *Allen* that "all teaching in a sectarian school is religious" or that "the processes of secular and religious training are so intertwined" that, in terms of the issue in this case, teaching of secular subjects is part of "the teaching of religion" (392 U.S. at 248).

Nor is the state impermissibly employing religious means to achieve non-religious ends. The thrust of the *Allen* decision was that substantial weight should be given to the consistent pattern of legislative judgments that the multiple functions performed by religiously-affiliated schools are generally severable. *Allen* thus recognized that the means of state aid—secular instruction in religiously-affiliated schools—is as secular as the ends, where the separation of sacred and secu-

lar will be maintained. The Pennsylvania Act maintains such separation.[7]

* * * * * * *

There remains for discussion the claim, common to the payments both for textbooks and materials and for teachers' salaries, that their effect is to foster religious divisiveness and to make religion a subject of political controversy, contrary to the spirit of the Establishment and Free Exercise Clauses. Members of this Court (*e.g.*, Mr. Justice Harlan, concurring, and Mr. Justice Douglas, dissenting, in *Board of Education* v. *Allen,* 392 U.S. 236, 249, 254), Judge Hastie, dissenting below (App. 104–105), and Professor Freund (*Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680) have expressed similar concern.

This claim, of course, is necessarily conjectural and is not subject to empiric demonstration. It poses difficult political problems that are more appropriate for legislative than for judicial resolution. Cogent arguments can be made on both sides of the question, and the effect upon the body politic of government programs to aid the secular activities of religiously-affiliated schools ultimately depends upon the reaction of the nation's citizenry.

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[7] Appellants contend that the necessary effect of the Act is to prefer one religion—Roman Catholicism—over others. The Act, however, is drawn with complete inclusiveness and neutrality, manifesting concern with the education of pupils in all nonpublic schools. It merely takes the schools and their enrollments as they are. Furthermore, appellants' argument that the Act prefers Catholicism is contradicted by their assertion that wealthy "private academies" not affiliated with the Catholic Church are receiving more than their fair share of reimbursement under the Act (Br., pp. 33–34).

The subject is one upon which the courts properly should give great weight to the legislative judgment. Pennsylvania has made the judgement, reflected in its Non-public Elementary and Secondary Education Act, that any divisive effect the program might have is outweighed by the benefits to the State's school population of assuring the high quality of secular education in private schools. Reasonable men could well reach different conclusions on that issue. As against the view that such government aid creates dissension, others might argue, with equal sincerity and force, that a greater divisive factor would be introduced into our society if religiously-affiliated schools were excluded from general programs of educational aid and were thus rendered unable to provide adequate secular education for millions of the country's children whose parents wish them to attend such schools. As the President stated this year in his message on Educational Reform, quoted earlier in this brief (*supra*, p. 3):

> The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools through which educational innovations come, both systems benefit, and progress results.

One of the great strengths of the American political system has been its ability to provide reasonable

accommodations of competing viewpoints and pressures, religious as well as political. See, *e.g.*, Moynihan and Glazer, *Beyond the Melting Pot* (1963). As long as State aid to religiously-affiliated schools is primarily secular in purpose and effect—as we believe is true of the Pennsylvania Act—this Court should not condemn it under the Establishment Clause because of uncertainly over how the majority of the people will react to it.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1970.

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*In lieu of the Solicitor General, who is disqualified for personal reasons.

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ARGUMENT.

For the first time in this case the argument has been made that unless the Pennsylvania Act is sustained the private school systems will close or vastly curtail their operations and that this will throw an impossible tax burden on the public. The Attorney General of Pennsylvania, on behalf of the state officials, does not make this argument; but it is made by the appellee schools and in the brief of the appellee Pennsylvania Association of Independent Schools and is, of course, found in almost all of the *amicus* briefs on behalf of the appellees.

This contention was prominent in the debates on the bill in the legislature, but until the filing of these briefs, it had not been previously made as a legal argument. It was not, therefore, referred to in appellants' brief.

The argument is not, in a proper sense, a legal argument, in that it does not purport to demonstrate the constitutionality of Act 109 on the basis of theory, precedent or logic or, in short on any legal basis. There is no doctrine known to constitutional law holding that otherwise unconstitutional legislation is constitutional if the cost of accomplishing the desired end by constitutional means would be far more expensive. Had *economy* or *efficiency* been a criteria of the founding fathers, they would never have established three independent branches of government or, for that matter, trial by jury or the right to counsel. Due process is costly.

Furthermore, it is difficult to see how this new argument can be squared with appellee's basic contention that the principal benefits of the legislation flow to the *children,* not to the institutions actually receiving the money. If this is so how will the nonpublic schools be saved by Act 109? Likewise the value-received argument,—that the state receives a *quid pro quo* and the schools give as much as they get must be considered gravely impaired. With the emergence

of this argument the issue is at least now divested of the window-dressing provided by the form and language of the Act and stands squarely before the court: the primary purpose and effect of Act 109 is to aid the parochial schools in order to prevent them from closing.

But this proposition, aside from its non-legal nature, makes more problems than it solves, particularly since we are before the Court on review of a threshold dismissal on Motion to Dismiss.

For the argument is a (dire) prediction based upon at least four assumptions of *fact:*

1. That the nonpublic school system is in serious financial straits and shrinking.

2. That the traditional support sources for nonpublic schools have reached the limit of their financial capabilities.

3. That without substantial state aid they will virtually disappear.

4. That the taxpayer will be unable to bear the costs of educating the children now in the nonpublic schools.

None of these facts are of record.

Furthermore, there are a number of other facts which tend to modify and even contradict the above four assumptions. For example, governmental statistics examined by appellants do not show any significant decrease in Catholic parochial school enrollment[1] not paralleled by decreases in public school enrollment. (It must be remembered that all school population is now commencing to decline and will continue to do so for the next decade as a result of a lower-

1. These statistics are consistent with press reports (Inquirer, September 22, 1970), of no decrease in enrollment in the five-county area schools of the Philadelphia Archdiocese, for year 1970-71.

Decline in the number of *schools* as opposed to enrollment is often cited, but it is appellants' information that most of this is due to a wise policy of consolidation.

ing of the birth rate in recent years.) Furthermore, it appears that all *other* non-public schools, both church-related and nonchurch-affiliated schools are *increasing* their enrollments. The two Jewish appellee schools joined in the brief in which this argument is made; but again, although nothing is of record, appellants' information is, and it is believed to be common knowledge, that there has been a general marked increase in enrollment in the Jewish parochial schools in the last decade. The Montgomery Christian Day School also joined, but that school is typical of independent fundamentalist and bible-oriented elementary schools springing up in a number of communities. Friends (Quakers) schools ended the decade of the sixties with an increase in enrollment of about 35%.[2] The Germantown Lutheran Academy also joined in this brief and this argument and, with itself having been founded but approximately five years ago, it is an example of the increase in the number of Lutheran (Missouri Synod) schools. As for nonchurch-affiliated schools, the last decade has seen their increase in areas where until recent years they were relatively rare, i.e., the Midwest and the West Coast, to say nothing of the great proliferation of private schools in the formerly de jure segregated states of the South.

At least the first assumption, that the nonpublic schools are already so financially pressed so as to have had to measurably curtail their educational efforts, must be pleaded as a fact and proved as a fact by appellees if they intend (over appellants' objection) to rely upon it, and this argument now having been made, appellants cannot be denied extensive discovery thereon.

As to the second assumption of the argument, that the

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2. DOC. OE-20111, Office of Education, Dept. H. E. W., U. S. Gov't Printing Office, Cat. FS 5-220:20111, (1968) (Table A), supplemented by verbal report from personnel at the Philadelphia Yearly Meeting.

resources of the groups supporting these nonpublic schools are strained to the utmost, there is nothing of record to sustain this and no reason to believe from general observation that there is any foundation for this whatsoever.

Appellants would surely also be entitled to discovery on this point. As an example of the kind of embroilment of the state in religious affairs which will result from Act 109, dissenting Judge Hastie in the court below pointed to the probing interrogatories already of record (stayed) as to the workings of the parochial schools. Discovery on this second assumption would necessarily be even more intimate and would surely require a complete financial disclosure by the various archdioceses in Pennsylvania if the schools intend to rely on financial distress as a reason for sustaining Act 109.

The third assumption, that, based on the preceding two, the nonpublic school system will shrivel to insignificance, is also not of record and not credible. It requires the assumption that deeply held beliefs and policies, some going back for many hundreds of years, for which many individual and group sacrifices have been made and battles fought, will be abandoned, because of financial strain, by groups which are now more affluent than they have ever been.

Finally, there is no evidence whatsoever for the proposition that the state cannot afford to educate all of its children. Indeed, the proposition is monstrous. Several states do not rely to any significant degree upon nonpublic schools. The figures are as follows: Utah educates 97.9% of its children in public schools; North Carolina 98.5%; Arkansas 98.3% and Alaska 97.2%. In addition, at least until 1966, Alabama, South Carolina, Georgia and Mississippi educated an average of 98% of their children in public schools. A notoriously poor state such as West

Virginia, according to 1968 figures, educated 96.3% of its children in the public schools.[3] One would need support of some kind of evidence for the proposition that that which is done in fact by a score of states is beyond the capacity of other and generally richer states with higher median and average income levels.

Appellants repeat that they do not believe that the Court can give legal credence to the economic argument. It has, however, been thrown into the scale by the appellee schools and since it is entirely based on factual assertions, surely appellants are entitled to discovery and a record, and appellees should be required to prove with competent evidence what they assert.

Respectfully submitted,

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3. DOC. OE-20111, Office of Education, Dept. H. E. W., U. S. Gov't Printing Office, Cat. FS 5-220:20111, (1968).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

No. 153

ELEANOR TAFT TILTON, ET AL., *Appellants*

v.

ELLIOT L. RICHARDSON, ET AL., *Appellees*

On Appeal From the United States District Courts for the Eastern District of Pennsylvania and for the District of Connecticut

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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1. The National Jewish Commission on Law and Public Affairs, a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox

Jewish Community in matters of public concern, hereby applies for itself and on behalf of the following National Orthodox Jewish organizations, for leave to submit the attached brief:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

2. Pursuant to Rule 42(3) of the Rules of this Court, consent to the filing of this brief was requested of the parties to both of these cases by letter of July 8, 1970. All the parties to both cases have consented to the filing of this *amicus* brief except the State of Connecticut, one of the appellees in No. 153.

3. The constitutional contentions asserted in these cases directly affect the Orthodox Jewish community of the United States, whose members have established almost 400 privately operated all-day schools throughout the country wherein approximately 70,000 youngsters are presently receiving a full secular education as part of a daily program which also includes training in Jewish religious subjects, Bible, Jewish History and the Hebrew language. The future well-being of these schools, in an age of spiraling educational costs, requires some financial assistance from tax revenues for their secular programs.

4. The *amici* strongly believe that American children should not be accorded second-class secular educations because their parents' religious beliefs commit them to in-depth religious training. The all-day schools described above have consistently provided superior secular educations to their enrollees, but this task has become exceedingly difficult with mounting costs. We believe that it is equitable and appropriate for State and federal tax revenues to share the costs of this nonreligious education so that American children of all faiths will be afforded similar educational opportunities and will be equally able to contribute to the development and growth of the United States.

5. The specific constitutional argument made in this brief—*i.e.*, that in view of the difficulties of balancing rights guaranteed by the Establishment and Free Exercise Clauses, this Court should defer (as it does in enforcement of the Equal Protection Clause) to the legislative judgment—has not, to our knowledge, been made in any of the briefs of the parties.

CONCLUSION

For the foregoing reasons, the motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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---

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

INTEREST OF THE AMICI CURIAE

The National Jewish Commission on Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The organizations named above, which have joined in this brief, are the major national rabbinic and lay Orthodox Jewish representative bodies in the United States. The *amici* are firmly committed to the protection of the constitutional rights of all Americans, and particularly to the preservation of the safeguards of the First Amendment, which are of paramount concern to the adherents of minority faiths in this country. While we staunchly support the principle of governmental noninvolvement in religious affairs mandated by the Establishment Clause of the First Amendment, we view the "absolutist" application of this Clause as a substantial threat to the freedoms guaranteed by the Free Exercise Clause.

The cases now before the Court concern the constitutionality of various forms of financial assistance

from tax revenues provided under federal and State laws to private educational institutions, including those which offer religious instruction or which are operated under sectarian or church-related auspices. In each instance, the funds granted or loaned must be used only for non-religious purposes, and they are available to all private institutions meeting defined criteria—whether the institutions be religious or totally secular.

Such financial assistance is of critical importance to the almost 400 Jewish day schools in the United States which, in an age of soaring educational costs, can no longer realistically rely solely on the voluntary contributions of their supporters. The *amici* firmly believe that a program such as those involved here —under which tax revenues subsidize all or a part of the nonreligious curriculum of such schools—equitably distributes the financial burden of the mandatory secular education of *all* students within a State or district among *all* its taxpayers. And to ban such assistance under the guise of maintaining the wall between Church and State is simply to discriminate, in violation of the Free Exercise Clause, against those whose religious convictions require them to provide a rigorous program of religious training for their children.

The interest of the *amici,* therefore, is in highlighting the Free Exercise principles which support legislation of the kind challenged here. We are troubled that those who are actively erecting the Wall Between Church and State seem to be burying under and in it the religious minorities it was designed to protect.

QUESTION PRESENTED

The only issue to which this *amicus* brief is directed is the following:

Whether a State or federal statute providing assistance from tax revenues for the nonreligious facilities or curriculum of private educational institutions violates the First and Fourteenth Amendments because it includes, among those eligible, institutions which also provide sectarian religious education or which are conducted under religious or church-related auspices?

ARGUMENT

Introduction

The Pennsylvania Legislature enacted a statute under which it reimburses certified nonpublic schools for certain actual costs incurred in providing courses in mathematics, modern foreign languages, physical science and physical education. The United States Congress has also enacted a statute under which grants are made to accredited institutions of higher education for the construction of academic facilities other than those to be used for religious services or as any part of a program of religious instruction. The central issue in these cases is whether these legislative measures exceed the limits set by the First and Fourteenth Amendments.

Our argument that they are plainly permissible exercises of the governmental authority over the distribution of tax revenues proceeds from four propositions:

First, neither statute grants any special preference to religious institutions. *All* nonpublic schools, whether denominational or not, are equally eligible.

Second, neither statute provides any direct financial assistance to religious activity of any kind. Both draw a clear and precise line between the financed secular purposes and instruction and the nonsubsidized religious curricula and objectives.

Third, a State or federal statutory scheme which would *exclude* certain nonpublic institutions from eligibility for State aid for secular instruction on account of their church affiliation or the fact that they also provide religious instruction would raise serious questions under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth.

Fourth, both statutes represent a permissible "neutral course" steered by legislative bodies seeking to reconcile the two Religion Clauses of the First Amendment. In this area, the constitutional principle that there be "play in the joints productive of a benevolent neutrality" (*Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970)) requires that this Court defer to reasonable exercises of the legislative judgment.

I

DISQUALIFICATION OF RELIGIOUSLY AFFILIATED INSTITUTIONS FROM BENEFITS GENERALLY AVAILABLE TO NONPUBLIC SCHOOLS WOULD RAISE SERIOUS QUESTIONS UNDER THE FREE EXERCISE CLAUSE

Just last Term this Court defined the "basic purpose" of the Religion Clauses of the First Amendment—"to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). These cases concern statutory provisions which accomplish precisely that objective—they grant to religiously

affiliated educational institutions the same access to public funds for their nonreligious activities as is enjoyed by nonpublic institutions which serve no religious purpose whatever.

The issue in these cases, starkly put, is whether educational institutions which provide religious instruction or services *in addition* to instruction in secular subjects are constitutionally disqualified by reason of their religious curriculum from enjoying the benefits of a State program which would be freely available to them if they were totally secular in nature. In neither of these cases do the appellants challenge the expenditure of public money for privately operated schools as such; they apparently would approve a statutory scheme under which only private institutions having no religious affiliation would be eligible for assistance from the public treasury. Such a system would, in our view, be fraught with serious constitutional doubts.

This Court recognized in *Board of Education* v. *Allen,* 392 U.S. 236, 247, 248 (1968), "that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," and that the private schools—"including parochial systems"—are performing "in addition to their sectarian function, the task of secular education." These plainly true and valid propositions apply to the higher educational institutions involved in *Tilton* v. *Richardson* (No. 153) as well as to the elementary and secondary schools in *Allen* and in *Lemon* v. *Kurtzman* (No. 89).

Would it be constitutionally permissible to deny public assistance to private institutions which carry

out "the task of secular education" because they also have a disparate "sectarian function" if others identically situated are eligible for such assistance because they have no "sectarian function"? Such a disqualification would, we submit, be constitutionally invalid under the principles of this Court's decisions in *Speiser* v. *Randall*, 357 U.S. 513 (1958), and *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

1. In the *Speiser* case the Court struck down a State statute to the extent that it conditioned the granting of a tax exemption on the suppression of constitutionally protected speech. By denying assistance from the public treasury to institutions which provide secular education solely because they *also* offer religious training, a State would be penalizing religion in the same way as California sought to penalize speech in *Speiser*.

2. The effect of such an exclusion of religiously affiliated institutions would be the converse of *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). It would disqualify from public benefits those institutions or individuals who, by reason of religious belief, deem it essential to provide a comprehensive religious education for their children (or, in the case of the colleges and universities involved in *Tilton*, for themselves) in the same institution and as part of the same school day as is given over to secular training. Obviously, a State statute which explicitly conditioned State aid on an individual's disbelief in thorough and rigorous religious training would be invalid under *Speiser* and *Torcaso;* the statute which appellants in these cases view as constitutionally mandatory is identical in its impact. See also *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

By contrast, the actual statutes challenged here are neutral and nondiscriminatory. They offer no advantage to religious schools or students on account of their religion, and they leave with such institutions and individuals the total financial burden of providing for their religious educations. All they achieve is an equality which is consistent with this Nation's great tradition of voluntarism, and which realistically makes the public purse share in the spiraling costs of secular education.

II

THE MEANS CHOSEN BY THE CONGRESS AND BY THE PENNSYLVANIA LEGISLATURE IN "CHARTING A COURSE" BETWEEN ESTABLISHMENT AND INTERFERENCE WITH FREE EXERCISE OF RELIGION ARE PERMISSIBLE

This Court need not, of course, decide in this case whether it would be constitutionally permissible for the Pennsylvania Legislature or the United States Congress to enact a statute granting benefits to private educational institutions and excluding those which are religiously affiliated. No such questionable line has been drawn in either of the two statutes challenged here. Instead, the responsible legislative bodies have taken precautions to keep tax revenues from assisting religious activities as such, and have made the funds available to institutions without regard to religious affiliation.

In an area where no "absolutely straight line" can be drawn and where, by the very nature of the constitutional principles, there must be "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz* v. *Tax Com-*

mission, 397 U.S. 664, 669 (1970)), the legislative judgment as to how to "traverse the 'tight rope' " (397 U.S. at 672) should be accorded great deference. For, as this Court noted recently in its *Walz* decision, the Establishment and Free Exercise Clauses require an "accommodation" because "either . . ., if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668, 669. In this field, as in the enforcement of the Equal Protection Clause of the Fourteenth Amendment, it suffices, therefore, for this Court "to perceive a basis upon which the Congress [or the State legislature] might resolve the conflict as it did." *Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966).

The analogy to enforcement of the Equal Protection Clause is, we submit, borne out by the nature of the danger against which the Establishment Clause protects. For, as the Court observed in *Walz,* the ultimate goal is to avoid "excessive government entanglement with religion" (397 U.S. at 674) while preserving "the autonomy and freedom of religious bodies" (*id.* at 672). The many factors which enter into this accommodation are similar in kind and degree to the "various conflicting considerations" enumerated in *Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966). Weighing the degree to which government agencies will become involved in religious affairs under one or another scheme of State financing of secular education is a function for which a court is ill-suited. A legislature, on the other hand, may consider what alternatives are available for the improvement of educational standards and can devise techniques for avoiding the entanglement which the Constitution forbids. It is also in a far better position to weigh the

public need for financial assistance of the kind provided by the challenged statutes and the effect on the welfare of the State and the Nation if it is withheld from religiously affiliated institutions.

There can be no serious doubt, we submit, that there is a basis in fact and reason for choosing the legislative remedies which are challenged in *Lemon* (No. 89) and *Tilton* (No. 153). Each of the statutes achieves the objective of this Court's past decisions dealing with "relationships between public education bodies and church-sponsored schools"—*i.e.*, "to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." 397 U.S. at 669. Hence both statutes are constitutional.

There remains only the claim that the bare allegation in this Court that the statutes have been administered—in violation of their own provisions—to subsidize religious instruction warrants a restraining order or injunction against their future application. That contention is patently unsound. If, in fact, religious instruction is being subsidized and such conduct violates the Constitution or the applicable statutes, the proper remedy is for an aggrieved party to sue to prevent the specific misapplication of federal or State funds. Compare, *e.g.*, *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). The burden of proving misuse of the funds in the specific case would then be squarely where it belongs—with the party challenging the expenditure. In the present instance, appellants are seeking to have the courts ban public

expenditures in wholesale fashion on the basis of generalized assertions—vigorously controverted by the appellees—regarding the nature of secular education in religiously affiliated institutions. Such an attempt to shift the burden of proof is as invidious and harmful to constitutionally secured rights as the attempt to shift the burden in *Speiser* v. *Randall,* 357 U.S. 513, 521-526 (1958).

A final word must be said on the pernicious and deplorable assertion made by certain appellants and *amici* that the statutes are constitutionally invalid because they authorize payment from the public treasury to racially segregated schools, and the attendant claim that decisions concerning Southern "tuition-grant" statutes such as *Bush* v. *Orleans Parish School Board,* 365 U.S. 569 (1961); *Poindexter* v. *Louisiana Financial Assistance Commission,* 389 U.S. 571 (1968); and *South Carolina State Board* v. *Brown,* 393 U.S. 222 (1968), control the present case. To even suggest an analogy between the establishment and financing in the South of private "academies" designed for no purpose other than the preservation of racial segregation and the operation and support of Jewish religious schools—which are part of a glorious tradition of learning dating back more than 3,000 years—is highly offensive to these *amici* and to the many American citizens of the Jewish faith whom they represent. The Biblical command incumbent upon each adult male of the Jewish faith "to teach [the religious precepts] diligently unto thy children" (*Deuteronomy,* VI, 7) neither awaited nor depended upon the outcome of *Brown* v. *Board of Education,* 347 U.S. 483 (1954). And the eligibility of the almost 400 Jewish day schools

—established in this country to enable the parents of the approximately 70,000 children now attending them to fulfill this Biblical obligation while affording them a complete secular education—should not, by the same token, turn on the racial distribution of students at the schools. It is plain that neither as to the schools affected here, nor as to the legislative programs which are challenged, can it be said that their "purpose, motive and effect . . . is to unconstitutionally circumvent the requirement first enunciated in *Brown* v. *Board of Education* . . . ." *Brown* v. *South Carolina State Board*, 296 F. Supp. 199 (D.S.C. 1968) *affirmed*, 393 U.S. 222 (1968).[1]

CONCLUSION

In these cases this Court must pass on the validity of legislative measures enacted by responsible representative bodies concerned with the need for improved educational programs and facilities in the United States and in the State of Pennsylvania. The steps taken in the challenged statutes are rational means of improving the quality of education while preserving the separation between government and religion which the Constitution commands. If this Court finds either of these programs impermissible under the First and Fourteenth Amendments, it will be foreclosing not only the specific form of assistance directly affected,

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[1] The plain distinction between the racially-motivated establishment of private academies in the South and the religious motivation underlying the creation of the Jewish day schools was spelled out in the brief *amicus curiae* filed by the National Jewish Commission on Law and Public Affairs *in support of the plaintiffs* in *Green* v. *Kennedy*, D.D.C. Civ. No. 1355-69, in which the tax exemption for the Southern private academies was successfully challenged.

but also other experimental efforts to upgrade the level of education in this country.[2]

In another context, Mr. Justice Holmes made the widely quoted observation that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York,* 195 U.S. 45, 75 (1905). Nor, we submit, did the Establishment Clause of the First Amendment enact James Garfield's views of nearly a century ago on the use of tax revenues for religiously affiliated schools.[3]

The touchstone of constitutionality must be, as this Court held in *Walz,* whether the measure is a "reasonable and balanced attempt to guard against [the] dangers" sought to be prevented by the Religion Clauses of the First Amendment. 397 U.S. at 673. The measures here challenged plainly qualify by that standard.

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[2] In March 1970, for example, under a grant from the United States Office of Economic Opportunity, a report was issued by the Center for the Study of Public Policy at Harvard University recommending a system of "Education Vouchers" for public and private institutions as "a new era of innovation and reform in American schools." Such a program would be impermissible under any of the rationales urged here by the appellants.

[3] Rutledge, J., dissenting in *Everson* v. *Board of Education,* 330 U.S. 1, 61, note 56 (1947), quoted Garfield's 1880 letter accepting the nomination for the presidency:

> "• • • it would be unjust to our people, and dangerous to our institutions, to apply any portion of the revenues of the nation, or of the States, to the support of sectarian schools. The separation of the Church and the State in everything relating to taxation should be absolute."

Accordingly, the judgments in both cases should be affirmed.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 569, 570

WILLIAM P. ROBINSON, Jr., et al., *Appellants* and
JOHN R. EARLEY, et al., *Intervenor-appellants*
v.
JOAN DICENSO, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

No. 89

ALTON J. LEMON, et al., *Appellants*
v.
DAVID H. KURTZMAN, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN Nos. 569, 570 AND TO FILE BRIEF AMICI CURIAE, OUT OF TIME, IN No. 89.

The following organizations—Center for Law and Education, Harvard University; East Harlem Block Schools; Milwaukee Federation of Independent Community Schools; Federation of Boston Community Schools; Bay High School; The Learning Place; Minuscule; New Community School; Primary Life School; and Symbas School—hereby move pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief amici curiae, in the above titled cases. In No. 89 appellants and the State of Pennsylvania and Pennsylvania Association of Independent Schools

as appellees have given consent to filing; but other named defendants below have either withheld consent or failed to respondent to our requests. In Nos. 569, 570 appellees have consented,[1] but appellants Earley and Robinson have withheld consent. The attached brief amici curiae is in support of the position of appellants in No. 89 and of appellees in No. 569, 570.

Under the briefing schedule established by this Court briefs amici curiae supporting the position of appellants in No. 89 were due in August, 1970. Since that time the Court has agreed to hear Nos. 569, 570[2] which raise substantially the same issues as No. 89. Briefs amici curiae in support of the position of appellees in Nos. 569, 570 are due by February 1, 1971. Movant organizations respectfully request that leave be granted to file the attached brief in Nos. 569, 570 and to file the attached brief out of time in No. 89.

As set out below and in Interest of the Amici, movant organizations represent a large number of non-public community schools whose basic interests and continued existence are directly affected by these cases. Movant organization Center for Law and Education has had extensive experience in working on equal education opportunity problems of minority groups and the poor, and was funded by the United States Office of Economic Opportunity to represent and articulate the interests of such groups. Movant organizations desire to present to the Court a unified treatment of the problems common to Nos. 89, 569, 570.

The scope of the problems involved in No. 89 and their ramifications for amici schools and the equal education opportunity of the poor and racial minorities were not clear until the Court noted probable jurisdiction in Nos. 569,

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[1] Written consent of these parties has been filed with the Clerk.

[2] Probable jurisdiction was noted on November 10, 1970. 39 U.S.L.W. 3194.

570 and cases involving similar laws were brought in lower federal courts in other states.[3] Movant organizations believe that the scope of the questions presented in all these cases can best be presented by treating the contested laws together in one brief.

The Center for Law and Education, Harvard University, was created jointly by Harvard Law School and Harvard Graduate School of Education, and is funded by the United States Office of Economic Opportunity to work in conjunction with local Legal Services Offices to "promote reform in American education by working in the area of social policy and the law." The Center is in contact with over 250 legal service offices involved with problems of the poor and has actively assisted scores of them in education litigation. The Center also does research into these problems and provides technical assistance to community groups and others concerned with equal education opportunity.

Amici schools are individual or federated, non-sectarian, non-public schools providing racially integrated experimental education. They are largely governed by parents, and are committed to community based education in urban areas across the country. The financial plight of amici schools is the same as parochial schools', but the composition of student body, method of governance, and nature of the curricula, all of which will be affected by these cases, are different. The unorthodox nature of this curriculum and the low income and racial composition of their student bodies make their interests substantially different from those of other kinds of non-public schools. All of these schools and the Center for Law and Education share a commitment, expressed in work, to equal education opportunity for those in public and non-public schools.

The interests of experimental, non-public schools such as those of amici, and the equal education opportunity interests

[3] E.g., *Johnson* v. *Sanders*, 39 U.S.L.W. 2225 (D.Conn. Oct. 14, 1970).

of the poor in public and non-public schools are not adequately represented by the parties or other amici in these cases. Movant organizations wish to bring to the Court's attention educational, racial, and economic consequences of these cases. These consequences are of constitutional magnitude not adequately dealt with by the parties. Movant organizations are well-equipped by virtue of their direct interests, experience with schooling, and extensive research and representation of interests of the poor and racial minorities to inform the Court of the national consequences of these cases for equal education opportunity.

Accordingly, movant organizations respectfully request that the Court grant leave to file the attached brief amici curiae.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 569, 570

WILLIAM P. ROBINSON, Jr., et al., *Appellants* and
JOHN R. EARLEY, et al., *Intervenor-appellants*
v.
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ALTON J. LEMON, et al., *Appellants*
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DAVID H. KURTZMAN, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE

For the Center for Law and Education, Harvard University; East Harlem Block Schools; Milwaukee Federation of Independent Community Schools; Federation of Boston Community Schools; Bay High School; The Learning Place; Minuscule; New Community School; Primary Life School; and Symbas School.

Interest of the Amici

Amici schools are East Harlem Block Schools, Milwaukee Federation of Independent Community Schools, Federation of Boston Community Schools, Bay High School, The Learning Place, Minuscule, New Community School, Primary Life School, and Symbas School.[1] Amici schools

[1] Amici schools are typical of a large number of "alternative" or

are independent and federated non-public community schools which represent a growing national education resource for racially integrated, experimental education. Schools of amici operate on the basis of deeply held philosophical, moral and educational beliefs, but are not affiliated with religious organizations. Schools of amici are set primarily in urban areas throughout the country, and include among their basic goals the creation of multicultural education for children of Black Americans and families with little or no income. Amici schools are pedagogically experimental and offer unorthodox curricula firmly based in concern for community development, cultural pride, and the individual development of students who have previously not benefitted from the tradition-bound offerings of public schools. The governance of amici schools is decentralized and rests in the hands of teachers, parents and students.

"community" schools which do not belong to any national association. The following brief descriptions are examples: *Milwaukee Federation* is comprised of seven schools formerly operated by the Catholic Church but turned over to the local community in 1969 and relying heavily on parent involvement and control. These decentralized schools provide free integrated education, with one school specializing in bilingual programs and one in programs for handicapped children. *Boston Federation* comprises three large schools attended by a majority of black students and supported partly through local fund raising and partly through foundation grants. No tuition is charged since a great percentage of the families involved have low incomes. Curricular emphasis is upon basic skills and the history and culture of Black Americans. *Bay High School* in Berkeley, California includes children 13-17 years old, is racially and economically mixed, and devotes part of its open structure curriculum to apprenticeships and involvement in real life problems of the community. *The Learning Place* is located in San Francisco and attended by 12-15 year olds in an ungraded program based on small groups and individual instruction. Students make all the basic decisions about their education. Students and staff have created an atmosphere of emotional openness which fosters learning and personal growth. Tuition is graduated according to ability to pay. *New Community School* of Oakland, California is an integrated high school with a black studies department and a heavy orientation toward multi-cultural education, community development, and experiments in governing structure involving parents, students and members of the community.

Amici schools are examples of hundreds of such individual new schools staffed by teachers and parents dedicated to making education creative and useful to minority groups.[2] Amici schools differ considerably in composition of student body, curriculum, and governance from most of the parochial schools and traditional "prep" schools which form the conventional public image of non-public schools. Amici schools share, however, the financial plight of these other non-public schools.

The future of amici schools, and the resource for relevant education and equal education opportunity they represent, requires that aid to non-public schools be delivered in a form which does not do violence to their educational philosophy and constitutional rights. Our research and experience indicate that the statutes at issue in these cases will eliminate amici schools and seriously hamper the educational progress of minority groups.

Amicus Center for Law and Education, Harvard University, was established in 1969 by Harvard University Law School and Graduate School of Education and by the United States Office of Economic Opportunity to "promote reform in American Education by working in the area of social policy and law." To carry out these purposes the Center has engaged in a wide area of research, technical assistance, and litigation on behalf of the educational rights of the poor and minority groups. The Center's major interest, which is expressed in its relations with Legal Service Offices across the country, is to

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[2] More detailed descriptions of the myriad and varied community schools can be found in G. DENNISON, THE LIVES OF CHILDREN (1969); Lawrence, *Free Schools: Public and Private and Black and White*, INEQUALITY IN EDUCATION numbers 3 and 4 (1970); Stretch, *The Rise of the Free School*, SATURDAY REVIEW, June 20, 1970. *See also* Arons, *The Joker in Private School Aid*, SATURDAY REVIEW, January 16, 1971, for additional comments on the educational effects on these schools of purchase of secular services legislation.

secure equal education opportunity to all citizens through legal and educational evaluations of public and private education. The Center's experience puts it in a unique position to evaluate the consequences of the instant cases for groups of citizens whose interests in education usually go unrepresented. The Center has served as amicus curiae in several of its areas of interest.

Amici submit this brief because they believe that their unique interests are affected but not represented by the parties or other amici curiae in these cases; because the Court's decisions in the cases before it will have significant influence on the quality of education and the form of aid to non-public schools adopted in states throughout the Union where amici schools or schools like them are located; because certain questions of public policy of constitutional magnitude are raised by and relevant to the disposition of these cases, but have not been adequately presented by the parties; and because amici believe that while the laws at issue in these cases will have unfortunate effects educationally, racially and economically, and are unconstitutional, forms of general aid to non-public schools which protect the constitutional rights of both amici and religiously affiliated schools and advance the national goal of equal education opportunity should not be precluded by the Court's decisions in these cases.

Introductory Statement

The record in *Robinson* v. *DiCenso,* the pertinent Pennsylvania and Rhode Island constitutional and statutory provisions, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the appellants and appellees. These amici accept them for purposes of their brief.

Summary of Argument

There is a growing financial crisis in the non-public schools of this country. It will continue unless public funds are made available to aid them for the education they provide to millions of students. Amici favor extensive aid to non-public schools—including those operated by religious institutions—but object strongly on constitutional grounds to the *form* of aid embodied in the statutes contested in these cases. Amici believe, however, that constitutionally acceptable forms of providing aid to all non-public schools do exist and are practical alternatives.

I. *Pierce* v. *Society of Sisters,* 268 U.S. 510, guarantees to parents the right to direct the education of their children by choosing schools not run by the state. In an attempt to satisfy Establishment Clause restrictions, the Pennsylvania and Rhode Island statutes have created a pervasive set of regulations for aided non-public schools based on conformity to the offerings and approaches of public schools. The effect of these regulations is to condition the granting of aid upon the forfeiture by unorthodox non-public schools of their educational principles and beliefs, and to erode the rights guaranteed by *Pierce.* These regulations are unconstitutional in view of the fact that there are practical, less restrictive approaches available to a state which wishes to provide general aid to non-public schools.

The requirements of using state approved teaching materials, teaching only what is taught in the public schools, and having only state certified teachers in aided courses are arbitrary and unreasonable when applied to secular non-public schools where there is no need to separate religious from secular teaching. Again, the availabilty of practical, less restrictive alternatives, makes the requirements unconstitutional.

II. The First Amendment, which applies to the states through the Fourteenth Amendment, requires that the states steer a course of neutrality in their relationships with religions, neither favoring one sect over others, nor religion over non-religion. Both the statutes at issue fail to meet this test because the amounts of aid per pupil available under them varies depending upon the non-public school chosen by the parents. This inequity is a function of aiding teachers or courses instead of pupils. This attachment of differential economic consequences to religious choices is directly contrary to *Sherbert* v. *Verner*, 374 U.S. 398 and puts the state in the position of favoring the schools of some sects over others. The aid provided in Pennsylvania, for example, ranged from $25 to $250 per pupil last year depending upon the school attended. The state has no legitimate justification for these extreme disparities, especially in view of the less restrictive alternatives available.

III. At present, non-public schools are attended almost exclusively by white students, and in a number of cases now pending many non-public schools have been alleged to be discriminatory in their admissions policies. In view of this situation, the Rhode Island and Pennsylvania statutes fail to provide adequate assurance that every student's opportunity to attend aided non-public schools is not conditioned on race or color. Effective mechanisms for preventing discrimination could have been adopted. The Plaintiffs in *Lemon* are entitled to standing to raise these issues since it is the absence of a plan of safeguards to which they object.

IV. The Pennsylvania and Rhode Island statutes violate the religion clauses of the First Amendment as articulated in *Board of Education* v. *Allen*, 392 U.S. 236, and *Walz* v. *Tax Commission*, 90 S.Ct. 1409. The attempt of these statutes to limit state aid to strictly secular activi-

ties fails because the distinctions which were useful in judging textbooks in *Allen* are not reliable for regulating teaching. Separating religious and secular activities is particularly difficult when dealing with courses inside religious schools where the composition of the student body and the beliefs of those who control such schools would lead one to expect the permeation of allegedly secular teaching with religious overtones and content. The burden is properly on the states to show that the means chosen to separate the religious and the secular in religious schools are in fact reliable. This they have failed to do.

Nonetheless, in attempting to regulate course content and teaching, the statutes at issue have established a complex of regulations and ongoing surveillance which entangles the states with religion to such a degree that they are in violation of the standard enunciated in *Walz*. Normal state regulations of non-public schools do not create such entanglement because such regulations are not aimed at distinguishing the religious from the secular.

In view of the realistic alternatives open to the states for providing aid to non-public schools without violating all of the constitutional principles noted in this brief, these statutes are unconstitutional, and should be struck down in a way which leaves room for more equitable and neutral legislation.

Argument

I. The Rhode Island and Pennsylvania Purchase of Secular Education Services Statutes Erode Parents' Fundamental Right to Educate Their Children in the School of Their Choice as Guaranteed by *Pierce* v. *Society of Sisters*, and Constitute an Arbitrary and Unreasonable Conditioning of Aid to Secular Non-public Schools.

The Rhode Island and Pennsylvania laws in question[3] impose substantial educational uniformity as a condition of aid; are anti-competitive to a degree which threatens the legitimate autonomy of all private schools; and are based upon the false assumption that the courses and books of the public schools are the only ones which can adequately express the legislature's concern with quality secular education for all youth.

Specifically, the statutes limit aid to those courses which use the same materials as public schools, or materials approved by the Superintendent of Public Instruction, thereby overly restricting the educational method and content of courses.[4] The statutes also limit aid to courses which are taught by teachers with state certificates, despite the fact that there is no general state requirement of teacher certification for teaching in accredited private schools[5], thereby creating an unreasonable restriction upon the staffing and availability of talents in private schools. The statutes also limit reimbursement to courses required or available in public schools.[6] This places a further burden upon teachers' and parents' rights to choose a non-public school education by shrinking and in some cases even eliminating legitimate

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[3] PA. STAT. ANN. tit. 24, §§ 5601-09 (1968); R. I. GEN. LAWS §§ 16-51-2 — 51-9 (1969).

[4] If non-public schools can be given general aid without secularizing restrictions, as amici suggest at Note 9, *infra*, R.I. GEN. LAWS, § 16-51-3, and PA. STAT. ANN. tit. 24, § 5604 are unnecessarily restrictive of the materials aided schools can use. Moreover, there exist more secular teaching materials than those used by the state.

[5] PA. STAT. ANN. tit. 24, § 5604 and R. I. GEN. LAWS, § 15-51-3. These sections prevent excellent teachers and para-professionals often used by community schools from receiving aid even though these states apparently have no educational objections to such personnel.

[6] PA. STAT. ANN. tit. 24, § 5603(3) and R. I. GEN. LAWS, § 4-51-2(2). These sections place unconstitutional restrictions on experimental approaches to education and unorthodox curricula such as those of amici. In light of realistic alternatives which do not require such limitations these sections also unjustifiably restrict the rights of those who wish to pursue state approved educational goals, such as reading, in religious formats.

alternatives from which parents may choose. These restrictions may have been adopted to avoid Establishment Clause problems. But the Establishment Clause, which aims to preserve individual religious freedom, does not justify conditioning aid in a way which violates other freedoms guaranteed by the First Amendment and as part of the "fundamental liberty" of all citizens.

Justice Douglas speaking for the Court in *Griswold* v. *Connecticut*, 381 U.S. 479, 483, held that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." In affirming the principles of *Meyer* v. *Nebraska*, 262 U.S. 390, and *Pierce* v. *Society of Sisters*, 268 U.S. 510, the Court mentioned several "peripheral rights" which are also protected by the First Amendment, including "the right to educate a child in a school of the parents' choice, . . . the right to study any particular subject or any foreign language, . . . and freedom of inquiry, freedom of thought and freedom to teach." 381 U.S. at 482. The *Pierce* decision held that the "fundamental theory of liberty upon which all governments in this Union repose" includes the right of parents to direct the education of their children. 268 U.S. at 535. As the Court held in *Pierce*, there is no "general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535. The right of the state to make reasonable regulations establishing educational minima is not denied, but there is a point at which a pattern of regulations may become so pervasive that its effect is to create substantial uniformity of schools and abridge the right of choice articulated in *Pierce*. *See also Farrington* v. *Tokushige*, 273 U.S. 284. The Rhode Island and Pennsylvania purchase of secular services statutes before the Court impose, in the name of securing secular education, a pattern of regulation demanding unjustifiable conformity to the education provided in public schools.

The Rhode Island statute at issue states that its purpose is "to provide a quality education for all Rhode Island youth, those in public and private schools alike." R.I. GEN. LAWS §16-51-1. Its aim is to support education in all schools. It entitles all private school teachers to aid if they meet the statute's criteria. These criteria apply to the granting of a statutorily created benefit, which may no more be conditioned upon unconstitutional standards than unemployment benefits, *Sherbert* v. *Verner*, 374 U.S. 398; public employment, *Shelton* v. *Tucker*, 364 U.S. 479; or tax exemptions, *Speiser* v. *Randall*, 357 U.S. 513.

In the words of the Court in *Frost Trucking* v. *Railroad Commission*, 271 U.S. 583 at 594:

> If the state may compel the surrender of one Constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution may thus be manipulated out of existence.

The criteria which govern the granting of aid must pass not only the tests relevant to the Establishment Clause of the First Amendment, but also must respect other First Amendment and "fundamental liberty" considerations. Aid criteria which satisfy the Establishment Clause but substantially restrict the right of parents to choose a school different from the public school guaranteed by *Pierce* would still be unconstitutional.

The infringement of First Amendment rights of choice, to teach and learn is especially suspect when the statutory scheme is viewed in the light of the less restrictive alternatives open to the state. The fact that the separation of secular and religious education is a justifiable state purpose, does not end the inquiry, for

> . . . this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.
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> *Shelton* v. *Tucker*, 364 U.S. 479, 488.[7]

Though amici bear no burden to spell out alternatives in detail, we do note that several have been suggested: education vouchers which would allocate funds to private schools through individual rather than state choice of recipient schools as the G.I. Bill does[8], or aid programs in which the state ensures that its minimum secular standards are met in aided schools by administering standardized tests properly adjusted for pupil characteristics. The standard Metropolitan Reading Readiness Test might be used, for example, to see whether reading was being taught at least as well as in the public school enrolling children with similar characteristics. Either of these alternatives might provide a satisfactory way of meeting Estabishment Clause standards without regulating the content and style of private schools to the point of invading privacy or limiting the expression of personal beliefs and the rights to study, teach, and choose forms of schooling other than those provided by the state.

These unconstitutional criteria on which aid is conditioned by these statutes constitute more than a mere technical violation. They will have serious practical ramifications. Independent community and free schools, such as those of the amici federations, are in as bad if not worse

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[7] *Cf.* Dean Milk Co. v. Madison, 340 U.S. 349.

[8] 77 Stat. 1177 (1958). For a more detailed description of a regulated voucher plan see Note 9, *infra*.

financial condition than Catholic schools. The effect of giving aid under these circumstances will be to force experimental, racially mixed, and publicly accredited schools to forfeit their educational principles or close, for they will in the future have to compete with state aided nonpublic as well as public schools. Imposing these restrictive standards on independent community schools as a condition of aid is rather like throwing a lifeline to a drowning man on the condition that having been saved he will become your slave. Moreover, they infringe the rights of parents to find personally suitable education for their children in violation of *Pierce.*

Amici do not oppose the granting of any aid to nonpublic schools, including religious related schools. Quite the contrary, both the survival of our educational principles and educational pluralism in general may depend upon such aid. But it is for just this reason that the form of nonpublic school aid is constitutionally and educationally critical. The form of aid adopted in Rhode Island and Pennsylvania, which protects one set of constitutional rights and liberties only at the expense of other equally important constitutional rights and liberties, should be found unconstitutional.

The restrictions in the contested statutes also limit unconstitutionally the *secular substance* of teaching even in *secular schools.*

Meyer v. *Nebraska, supra,* held unconstitutional a statute which prohibited the teaching of any language other than the English language in any school in Nebraska. In so doing the Court held that such interference with the "right to teach", and the opportunities of children to acquire knowledge was "a legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S. at 400. Thus any regulation of independent schools must bear a reason-

able relation to a justifiable state purpose. *See also Farrington* v. *Tokushige,* 273 U.S. 284.

The laws in question attempt to draw a line between the secular and the religious by requiring that courses and materials subsidized be those used in public schools. This limited view of what is secular effectively eliminates from aid other courses which are equally secular but ideologically or pedagogically different. This restriction on beliefs, values and educational techniques when applied to secular non-public schools is an over-broad classification which cannot be justified in the name of separation of church and state. Many of amici schools operate upon value systems which are not harmful to society (and cannot, therefore, be restricted under the doctrine established by *Meyer* and *Farrington*) but which are markedly different from those of the public schools. The Court cannot justifiably ignore as inconsequential strongly held convictions and beliefs merely because they do not take the form of articulated religious doctrine. *Cf. Welsh* v. *United States,* 90 S. Ct. 1792. The fact that no course in black history and culture is offered in public schools does not form a justification for prohibiting aid to such courses in secular private schools. A law whose goal is to restrict aid to courses only on the basis of secular content cannot deny aid to a course because the secular views discussed are not those of the state. The restrictions on these statutes, therefore, are arbitrary and unrelated to any justifiable governmental purpose.

It may be argued that any non-pubic school aid restrictions must necessarily apply to secular schools as well as religious schools if the laws are to avoid discriminating against religious schools, in violation of the Free Exercise Clause. This argument may be correct. But rights cannot be taken from secular schools in order to preserve rights of religious schools any more than religious schools could

be discriminated against in order to preserve the First Amendment rights of secular institutions. If the contested states' plans result in infringements upon the First Amendment rights of *secular* non-public schools, the states must find an alternative means of providing aid to *all* non-public schools.

Amici believe that there are plans such as the "regulated education voucher" plan [9] which are capable of providing substantial aid to non-public schools [10] which preserve the fundamental liberties of those attending both secular and religious non-public schools. Under such a plan, parents of school age children would receive vouchers for tuition which could be used in any non-public (and perhaps public) school approved by the state under its normal compulsory attendance laws. The state should provide parents with sufficient information to make intelligent choices. But as with the G.I. Bill, no complex of secularizing restrictions would be needed. We urge the Court to hold the Rhode Island and Pennsylvania plans unconstitutional, but to leave constitutional room for other forms of aid meeting the standards of *Pierce, Meyer,* and *Farrington.*

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[9] *See Education Vouchers: A Report on Financing Elementary Education by Payments to Parents*, prepared for the United States Office of Economic Opportunity by the Center for the Study of Public Policy, Cambridge, Mass. (December 1970), for a more detailed analysis of different forms of voucher plans. Regulations for insuring equal education opportunity in such plans were formulated. In particular, the proposed regulated voucher plan set forth in the report provides for stringent standards to prevent racial discrimination in aided schools. Compare the segregationist voucher plans struck down in past court decisions: *e.g.*, Brown v. South Carolina State Board of Education, 296 F. Supp. 199 (D.S. Car. 1968), *aff'd per curiam*, 393 U.S. 222; Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. (E.D.La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

[10] For a discussion of why such a plan would not violate the Establishment Clause, see section IV, *infra*; Appendix A of the Education Voucher Report, note 9, *supra.*

II. The Rhode Island and Pennsylvania Statutes Fail To Provide Aid in the Neutral Manner Required by the First and Fourteenth Amendments Because Different Amounts Are Provided for a Student Depending on Which School He Attends.

The statutes at issue fail to meet the policy of religious neutrality required by the First Amendment because the amount of state aid available to a student depends on the school in which he enrolls. If a student attends one non-public school the state will pay more money for his education than if he attends another. The state thereby creates an economic premium on what should be unfettered choices of individuals. This disparity in funding occurs because contracts between the state and the non-pubic school or teacher provide aid regardless of the number of students enrolled in the school or course. There are no per capita provisions. As a result some schools in Pennsylvania received less than $25 per student while others received over $250.[11] The effect of these disparities in aid is that the state encourages families to send their children to the schools of the sect or sects which receive the most aid per child.

One of the fundamental requirements of the establishment and free exercise clauses of the First Amendment is that a state must "be neutral in its relations with groups of religious believers and non-believers." *Everson* v. *Board of Educ.*, 330 U.S. 1, 18. Neutrality requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief." *Allen,* 382 U.S. at 249 (Harlan, J., concurring). This "is to insure that no religion be sponsored or favored,

[11] Pennsylvania Office of Aid to Nonpublic Schools, An Analysis of Significant Data (1969).

none commanded, and none inhibited." *Walz* v. *Tax Commission*, 90 S. Ct. at 1411.

Significantly, all of the non-public school aid programs previously upheld by the Supreme Court have provided aid in a neutral fashion. In *Cochran* v. *Louisiana*, 281 U.S. 370, textbooks were allocated to students free of cost regardless of the school they chose to attend. In *Everson* and *Allen* bus transportation and textbooks were provided in similar fashion.

In all three instances, therefore, the aid did not distort the choices that non-public schools families would have made if there were no state aid; if anything, the aid enhanced their choices. These statutes, by contrast, provide aid in a way which may seriously distort the choices families make in selecting which non-public school their children will attend.

Families cannot normally enroll their children in the Baptist school for mathematics and the Methodist school for latin. Families, in short, must select an entire school, not specific courses or teachers. The total aid per child therefore, is the relevant figure to review. Per child aid best measures the impact the state aid will have on the choice of school made by families.

Neutrality may not require that all government aid which reaches religious institutions must be provided in an absolutely neutral fashion. If the total aid is only a small portion of the school's budget, for example, biased funding may not significantly affect the choices individual families make in selecting schools. But if the state is in the position of offering ten times as much aid per child in one school as in another, the difference is clearly enough to seriously distort private choice. As with one man, one vote, there is no precise mathematical limitation on the amount of permissible variation in the aid provided per child to different schools which may readily be found in the First Amend-

ment. Thus, "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of [the religious] provisions." *Walz* v. *Tax Commission,* 90 S. Ct. at 1411. But extreme variations in aid should at a minimum not be permitted unless the state can demonstrate there was no way to provide aid which would involve fewer infringements of basic religious rights.[12] *Braunfield* v. *Brown,* 366 U.S. 599: "But if the state regulates conduct by enacting a general law with its power, the purpose and effect of which is to advance that state's secular goals, the statute is valid despite the indirect burden on religious observance *unless the state may accomplish its purpose by means which do not impose such a burden.*" (emphasis supplied). *See also Shelton* v. *Tucker,* 364 U.S. 479, 488; *Speiser* v. *Randall,* 357 U.S. 513.

Because of the way aid is provided by these statutes, some families are forced to choose between exposing their children to religious teachings not of their own choosing and receiving much less state aid for their children. Whether the extreme differences in aid are passed on to families in the form of tuition reductions, or improvements in the quality of education provided, governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed for worship. *Sherbert* v. *Verner,* 374 U.S. 398. The plaintiff in *Sherbert* was deprived of her unemployment benefits because she refused to work on Saturday contrary to her religious convictions. The Supreme Court held that this denial of state funds was unconstitutional, because the state was providing different economic consequences depending on the religious affiliation of the recipient. This

[12] Neutrality does not require that all children receive the same aid, merely that differences must be justified by the state. Disadvantaged children may, for example, require compensatory funding.

is the same inequity present in these statutes, for there is an economic consequence to the family which depends upon the religious (or non-religious) affiliation of the non-public school selected. Such favoritism violates the essence of neutrality, and should not be permitted.[13]

III. The Rhode Island and Pennsylvania Purchase of Secular Education Services Statutes Violate the Equal Protection Clause of the Fourteenth Amendment Because the States Failed to Ensure That Students' Opportunity to Enroll in Aided Schools is Not Conditioned on Race or Color; Plaintiffs in *Lemon* Have Standing to Raise the Issue.

The education provided by a state "must be made available to all on equal terms." *Brown* v. *Board of Education*, 347 U.S. 483, 493. Until recently, most states chose to provide a free public education almost exclusively through a system of public schools.[14] Now many are recognizing that an adequate education may also be provided, at least in part, through reliance on private schools.[15] The Pennsyl-

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[13] The regulated voucher plan set forth in note 9, *supra*, would preserve neutrality for a student would be given the same voucher regardless of the denomination (or nondenomination) of the school he chose to attend. For a more complete dicussion of preserving neutrality in school aid programs see Areen, *Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?* 22 Case W. Res. L. Rev. No. 2 (1971).

[14] *E.g.*, the Rhode Island Constitution provides: "The diffusion of knowledge, as well as of virtue, among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education." R. I. Const. art. XII, § 1.

[15] Significantly, the Pennsylvania Constitution formerly provided: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public schools*, wherein all the children of the Commonwealth above the age of six years may be

vania legislature thus declared in its non-public school aid statute that:

> the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through non-public education. PA. STAT. ANN. tit. 24, § 5602(3) (1968).

But the obligation to make publicly funded education available to all on equal terms continues even though states are now choosing to rely on the private sector to provide some of the education services.[16]

Available statistics demonstrate that at present most private schools are more racially exclusive than the communities they serve.[17] Thus the United States Commission on Civil Rights concluded that "private and parochial school enrollment, which is overwhelmingly white, also is

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educated." PENN. CONST. art. X, § 1 (1966). It now provides: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public education* to serve the needs of the Commonwealth." PENN. CONST. art. III, § 14 (1967) (emphasis supplied). The change from "public schools" to "public education" supports the move to reliance on private schools, but affirms that it is "public" education which must be supplied, that is, education available to the public, not just to citizens of only one race.

[16] "[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted '*ingeniously or ingenuously*'." Cooper v. Aaron, 358 U.S. 1, 17 (emphasis supplied). This principle applies to any program which entrusts the public function of education in part to private schools. *Cf.* Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921.

[17] In 1960, of the more than four million pupils enrolled in non-public elementary schools in the United States, only 140,529 were nonwhite. U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF POPULATION, PC (2)-5A, Table A-1 at 129 (1964).

a significant factor in the increasing separation of white and Negro school children." [18] The Commission also found that nearly forty per cent of the white elementary school students in fifteen large metropolitan areas attended non-public schools in 1960; almost all of the schools were white.[19]

These statistics place a heavy burden on any state which relies on private schools for supplying publicly funded education to ensure that all students have an equal chance to attend any state supported school regardless of race or color.[20] In Pennsylvania, the preponderance of schools eligible for aid under the contested statutes were racially segregated in both composition of pupils and of teachers and administrators, such segregation arising "either by religious requirement, design, tradition, policy, quota, cost or residential pattern." [21] Yet Pennsylvania provides meagre and unreliable protections against such discrimination. There is no provision regarding discrimination in the statute at all. Article VII of Pennsylvania Governor's Code of Fair Practices which prohibits discrimination in state contracts on account of race, color, religious creed, ancestry, age, national origin or sex may apply in part, although an opinion of the Attorney General casts doubt on even this measure.[22] The Rhode Island statute merely requires compliance with Title VI of the 1964 Civil Rights Act.[23]

The difficulty of satisfying this burden when a state

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[18] UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 31 (1967).

[19] *Id.* at 39. *See also* Johnson v. Sanders, 39 U.S.L.W. 2225 (D.Conn. Oct. 14, 1970).

[20] *Cf.* Turner v. Fouche, 38 U.S.L.W. 4090 (1970); United States v. Board of Educ. of City of Bessemer, 396 F. 2d 4446 (5th Cir. 1968), *cert. denied*, 393 U.S. 1060; United States v. School Dist. 151 of Cook County, Ill., 301 F. Supp. 201, 228 (N.D.Ill. 1969), *aff'd* ___ F. 2d ___ (7th Cir. 1970).

[21] Plaintiffs' Complaint in Lemon v. Kurtzman.

[22] Appellants Brief in Lemon v. Kurtzman, p. 53.

[23] R. I. GEN. LAWS § 16-51-5.

launches upon a program of providing education through private schools, with their present pattern of racial isolation, is exemplified by *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D.Va. 1969). The court held, in striking down a state tuition voucher program despite claims by the state that it would be possible to bar aid to racially discriminatory schools:

> An absolute and unequivocal prohibition [of this type of non-public school aid program] is the logical effectuation of the [Supreme Court's ruling in *Poindexter* v. *Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). The fact that] the process is too complex to be practicable . . . defeats the assertion for the vaidity of the statute, that grants can in individual instances be employed without fostering segregation. This supposition accepted, still the canvassing and policing of the tuition law to confine its enjoyment to such instances would be a Herculean task. It could hardly give full assurance against the abuse of the law. A law may, of course, survive despite its unacceptable consequences, if the valid portions may be independently enforced. Here, as we see, there can be no such separation and the entire law must go. 296 F. Supp. at 1181-82.

At a minimum, this decision confirms that there is a heavy burden placed on any state undertaking such a program to ensure that students of all races have an equal opportunity to attend the subsidized schools regardless of race or color.

This obligation cannot be fulfilled simply by a statement of compliance with Title VI or a state non-discrimination directive, as in the Rhode Island and Pennsylvania stat-

utes, in view of the statistics demonstrating the "white" character of non-public schools. Nor can the state place its burden of policing discrimination on private individuals. The history of the difficulty of prohibiting discrimination in public schools and the knowledge of the results of unregulated individual choice indicate how difficult enforcement is even when the relatively accessible standard of residence is used to allocate students to publicly funded schools. Private schools, by contrast, select students on a one by one basis, a process which more easily conceals racial discrimination. The Constitution's prohibition against discrimination in publicly funded education is so fundamental that the states' failure to provide adequate enforcement mechanisms in these laws is not acceptable, particularly in light of the fact that adequate enforcement mechanisms are available. *See Green* v. *County School Board*, 391 U.S. 431; *Cf. Shelton* v. *Tucker*, 364 U.S. 479, 488.

At a minimum, adequate enforcement would include the authority to investigate complaints of deliberate segregation, to initiate investigations in the absence of such complaints, to collect application and enrollment data, to make findings of fact, conduct hearings, make judgments and cut off aid to schools found to be racially discriminatory.

Alternatively, a state might develop a realistic standard, focussed upon performance or effects, which would more efficiently measure compliance. An aided private school might be required, for example, to admit the same proportion of minority students as apply to the school.[24] In view of the availability of efficient and effective protections against racial discrmination in aided schools, these statutes clearly violate the Equal Protection Clause.

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[24] See The *Education Voucher Report*, *supra*, n.9 for a discussion of other possible mechanisms for preventing racial discrimination in aided nonpublic schools including random admissions, quotas and financial incentives for inclusion of minority students. *See also Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, (1968).

If these statutes are upheld despite their failure adequately to prevent racial discrimination, the result may well be to increase racial isolation in schools and racial tension in the country. To uphold these laws, which would aggravate the nation's most ominous problem, would be contrary to the interests of amici, those attending public schools, the nation and the Constitution.

Plaintiffs in *Lemon* were denied standing even to raise equal protection claims on the grounds that their children had not been refused admission to aided non-public schools. But the violation complained of is the failure of the states adequately to insure equal access to schools aided under these statutes. The absence of these safeguards provides the nexus between individual Black plaintiffs and the denial of equal protection. Standing should be granted, and the issue heard. *See Flast* v. *Cohen*, 392 U.S. 83. *Cf. Coffey* v. *State Education Finance Commission*, 296 F. Supp. 1389 (S. D. Miss.)

Access to public schools has traditionally not been conditioned on the ability to pay. With the enactment of these statutes, states are for the first time supplying resources designated for public education through private schools. The limited amount of aid provided means that only those wealthy enough to afford whatever tuition is charged by the aided schools can benefit from the program. Because of the high correlation between race and low income,[25] the effect of this approach is to further restrict the opportunity to attend aided private schools on the basis of race or color. Though the criterion is money, the effect is to increase racial isolation. This is an additional reason why these statutes violate the Equal Protection Clause.[26]

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[25] U.S. Dept. of Commerce, Bureau of Census, *Current Population Reports, Consumer Income*, Series P-60 #75, P. 23, # 7 (Dec. 14, 1970).

[26] Conditioning access to publicly supported education on family income may itself violate the Equal Protection Clause. See J. COONS,

IV. The Rhode Island and Pennsylvania Statutes Violate the Establishment Clause of the First Amendment Because Distinctions Between Primarily Secular and Primarily Religious Instruction in Religious Schools Cannot Reliably Be Made; Moreover, in the Attempt to Provide a Dependable Method for Making Such Distinctions These Laws Create an Impermissible Degree and Kind of Entaglement Between Government and Religion in Violation of *Walz* v. *Tax Commission.*

a. *Failure to distinguish religious and secular teaching.*

Purchase of secular education services laws such as those of Rhode Island and Pennsylvania attempt to extend the language of *Board of Education* v. *Allen*, 392 U.S. 236, beyond textbooks to programs involving general aid. The ability of these stautes to meet the *Allen* test of a "secular purpose and primary effect that neither advances nor inhibits religion" depends, therefore, on the practical success of their provisions which attempt to liimt the aid provided to strictly secular activities. But because of the nature of the process regulated the safeguards adopted are unreliable.

The Rhode Island law requires as a condition for the payment of salary supplements that the teacher receiving aid "only teach those subjects required to be taught in public schools or which are provided in public schools throughout the state, or any other subjects that are taught in public school." R. I. Gen. Laws § 16-51-3. This distinguishing of secular and religious education is fundamentally different

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W. Clune, & S. Sugarman, Private Wealth and Public Education (1970); Michaelman, *On protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

from that of *Allen*. In these laws assurance of secularity depends not upon examination of a textbook which can be checked once and for all times, but upon policing the ongoing teaching process, R. I. GEN. LAWS § 16-51-3, a process which may vary from day to day. Courses with titles similar to those taught in public schools are regarded as "secular" even though they are taught in a building and a learning atmosphere permeated by religious expectations, overtones, values, and intents. In the area of teaching and course design, distinctions between the religious and the secular cannot be uniform, are not enforceable, and often are so fleeting as to create an unacceptable risk that religion will be aided.

The Pennsylvania law attempts to separate secular from religious activities by funding only four types of courses; those in mathematics, physical sciences, modern foreign languages, and physical education. PA. STAT. ANN. tit. 24 § 5604. But a survey of course titles and descriptions hardly constitutes a dependable judgment that religion is not also being taught. The line between physical sciences and biological sciences, for example, is rapidly dissolving, especially with regard to the chemical origin of life, hardly a subject devoid of theological content. If such distinctions are not tenable within the disciplines themselves, they certainly cannot be a reliable means of separating the secular from the religious in education.[27]

The problem is compounded by the fact that not only is it difficult to classify subject matter as secular or religious, but that in a religious school the method of teaching, the points of reference used, and the answers given to student questions may all be permeated by religious values and philosophy. These laws advance the bold assertion that all these parts will constitute a secular whole. Short of peer-

[27] *See also* Everson v. Board of Education, 330 U.S. 1, 46 (Rutledge, J. Dissenting)

ing into a teacher's brain or monitoring daily lessons, how can any dependable separation of secular and religious activities be made within religious schools? There are indications that it may not even be possible to judge effectively whether textbooks are secular or religious. *See Note, Sectarian Books, the Supreme Court and the Establishment Clause,* 79 YALE L.J. 111 (1969). To attempt to push such distinctions to judgments about something as organic and flexible as course content and teaching is an exercise in futility.

According to Catholic educators, Catholic educational philosophy aims at integrating a student's knowledge to give him the philosophy of life consonant with the beliefs and practices of the Catholic Church. *DiCenso* J.A. p. 212, 215, 236. This philosophy indicates an intention to integrate rather than to separate religious and secular education in Catholic non-public schools. Testimony in *DiCenso* further demonstrates that the physical character and design of the parochial schools reflects and helps to create this permeating religious atmosphere. *DiCenso* J.A. 232, 233. It is questionable whether any education can be neutral in the sense of being free of the influence of moral values or behavioral norms based upon such values. It would be strange indeed if the "secular" courses taught in a religious school organized around carefully articulated theological principles were exceptions. Certainly many parents chose to pay tuition at religious schools not merely to receive 2½ hours a week of religious instruction, but to receive a complete education which conforms to their religious values.

The difficulty [28] and consequent unreliability of making judgments about secularity where teaching rather than texts are concerned is accentuated when religious rather

[28] The line between beliefs or teachings which are "religious" and those which are philosophical or sociological is not at all clear. *Cf.* Welsh v. United States, 90 S. Ct. 1792.

than public schools are at issue. Public school officials do have to make such judgments in insuring that religion is not advanced by the public schools. *See, Abington* v. *Schempp, supra.* But in public schools, policy is controlled by a secular authority and those in attendance who represent all religious and non-religious beliefs are there to bring violations to public attention. The burden, therefore, is properly upon individual plaintiffs to demonstrate that some facet of a public school program is religious. In religious schools, on the other hand, the burden properly shifts to those who would allege that courses are secular.[29] Both the shared religious values of the policy makers and the absence of those who would protest the presence of religious teachings in "secular" courses differentiate these schools from public schools. In these cases, therefore, the burden is on the state to assure that the courses it aids are secular, since that is the basis on which these statutes are alleged to conform to the Establishment Clause. They have failed to meet this burden.

Amici do *not* contend, however, that all programs of comprehensive aid to non-public schools necessarily violate the Establishment Clause. On the contrary, Amici believe that aid which is allocated on the basis of private rather than state choice is constitutional as long as no more aid is provided than the value of the education supplied in return.[30]

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[29] The holding in *Allen*, 392 U.S. at 248, does not contradict this contention. There the Court found that "only secular books may receive approval." 392 at 245. In view of this proven "secularity," the meagre record in the case failed to show that the (secular) textbooks would be used for religious teaching. In these cases, however, it is the secularity of the teaching which is at issue. A state's responsibility for proving "secularity" in religious schools cannot be avoided by assertion where all the factors of atmosphere, philosophy of education, governance and student composition point in the opposite direction.

[30] Parent choice would not, however, justify racially discriminatory schools for the purposes and reach of the Equal Protection clause are

One example of such a plan is a regulated education voucher plan to which Amici have referred already. Under such a plan it would not be necessary to separate religious and secular activities.

The ability to trace an indirect chain from tax revenues to religious schools satisfying state education requirement does not make a law providing comprehensive aid to non-public schools unconstitutional, provided that the weight of separation of church and state falls on intervening parent choice rather than on the unreliable separation of secular and religious teaching attempted in statutes like those of Rhode Island and Pennsylvania. Amici believe, therefore, that the unconstitutionality of these statutes does not foreclose the possibility of providing significant aid to non-public schools.

b. *Failure to meet the Walz entanglement standard.*

In their unsuccessful attempt to separate secular and religious teaching so that state funds do not in fact aid religion, the Pennsylvania and Rhode Island statutes have set up a complex of regulations and surveillance which so entangle the state with religion that the laws violate *Walz* v. *Tax Commission of New York*, 90 S.Ct. 1409.[31]

In *Walz* the Court introduced a new pragmatic view of neutrality which rests on the Court's view that any program which "realistically 'establishes' religion" can be dealt with "while this Court sits." 90 S. Ct. at 1416. The opinion introduced an additional hurdle for aid programs

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greater than those of the Establishment clause and are not balanced by countervailing considerations like the Free Exercise clause.

[31] The only two federal district courts which have reviewed purchase of secular services statutes since *Walz* support this conclusion. DiCenso v. Robinson, 316 F. Supp. 112; Johnson v. Sanders, 39 U.S.L.W. 2225 (D. Conn. Oct. 14, 1970). Lemon v. Kurtzman, by contrast, was decided before *Walz*.

—there must be no excessive entanglement of the state in church affairs. The test is "one of degree." 90 S. Ct. at 1414.

As the Court noted in *Walz* the insulation and separation which the entanglement test aims to preserve does not forbid all contact. It prohibits only the degree and kind of involvement which would have a chilling effect upon religious activity, constitute an interference with religion, promote the conditions of political fragmentation along sectarian lines, or tend to politicize religion. These are the dangers which the First Amendment has always sought to prevent. The entanglement referred to in *Walz* is involvement with *religious* activity. It is crucial at this point to recognize that merely stating that the services which receive state aid are "secular" does not mean that whatever entanglement exists involves only secular activity. The excessive entanglement of these laws is a direct product of trying to separate the religious from the secular. Every regulation and decision which involves separating the secular from the religious necessarily touches upon the religious and is entangled with it. In the words of the *DiCenso* court, "we reject. . .intervenors' view that the only relevant evidence concerned the activity subsidized, i.e. secular teaching in parochial schools. Such a narrow view of relevance in effect prejudges the central legal issues of the case." *DiCenso* J.A. at 30.

Ordinary state regulations of private schools designed to insure that they meet minimal educational standards and compulsory attendance requirements do not raise the same problems of entanglement.[32] These regulations are totally secular in purpose and effect since they do not have as any part of their aim the separation of religious from secular teaching.

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[32] Restrictions on racial discrimination, which are secular in nature, would also not be barred by the entanglement test.

The majority and concurring opinions in *Walz* single out four basic attributes of impermissible entanglement of the state with religious institutions: statutory or administrative standards of a detailed nature, 90 S. Ct. at 1414; continuing relationship calling for official surveillance, id; "active rather than passive state involvement with religion," 90 S.Ct. at 1423; and governmental efforts to discern "what is or is not religious" or to examine the worth of particular programs conducted by religious institutions. 90 S. Ct. at 1414. For each of these kinds and degrees of involvement with religion, entanglement replaces separation and threatens to interfere with religion or to result in advancing religion.

The Rhode Island and Pennsylvania laws create each kind of entanglement which the Court in *Walz* suggested would be offensive. Both statutes contain extensive statutory and administrative regulations whose purpose it is to insure the secularity of aided instruction. The Rhode Island statute requires that teachers receiving the 15% salary supplement teach only courses offered or required in public schools, that the textbooks used be only those approved for public school use and that the teacher hold a state certificate and sign an oath promising not to teach a course in religion. R. I. GEN. LAWS § 16-51-2-3. Supplements are paid semi-annually by the state Commissioner. The role of the teacher is restricted by administrative regulations, setting up a tension between the ordinary direction of teaching and the requirements imposed on teachers who receive salary supplements. Amici believe that these intrusions upon the freedom of teachers create a chilling effect on the entire teaching process and distort the learning atmosphere. It will not do to argue that the restrictions are minimal because the state must only find the title of the subsidized course in a public school syllabus. Such a perfunctory examination of secularity is hardly the

mark of a state which intends seriously to regulate the separation of religious and secular teaching.

The school itself is also subject to close scrutiny by the state. The financial records of the private school are made subject to audits by the state department of education "to determine whether per pupil expenditure for secular education equals or exceeds" that in the public school R. I. Gen. Laws § 16-51-5. Subsidies are renewable annually, making the frequency and importance of this scrutiny something which is likely to be constantly in the minds of those who teach and those who administer private schools, and threatening constantly to errupt into divisive controversy between the state and the religious institutions whose life will be tied to the state subsidy. *See DiCenso* J.A. at 42. Amici believe that the state of mind engendered by such detailed standards of teaching and content cannot but impinge upon the freedom and creativity of the teacher. In the words of Justice Frankfurter, "[U]nwarranted inhibition upon free spirit of teachers affects not only those who are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice." *Wieman* v. *Updegraff,* 344 U.S. 183 at 195.

The relationship fashioned by the Pennsylvania law is similar to Rhode Island's. The standards are somewhat different, but equally detailed. They call for extensive surveillance by the state of private school activities, personnel, accounting, and performance. As with the Rhode Island law, the Pennsylvania plan determines eligibility for active transfer of subsidies on the basis of investigation about the content of a sizable segment of private school time.

Finally, it is the avowed purpose of these regulations, standards and surveillance to determine what is religious and what is not, and to assess the worth, in light of the

statutes' secular purpose, of non-public school courses, materials, and teachers.

From the perspective of the *Walz* decision and the policies of neutrality and voluntarism which underly the religion clauses, purchase of secular services plans contains a constitutionally fatal and inherent inconsistency. To guard against sponsoring or supporting essentially religious activity these laws have created a scheme whereby the state must become so entangled with the institutional and individual aspects of religious schools that the result is interference with the religious activities of these schools of an impermissible degree and quality. To avoid this interference with religious schools would be to eliminate the only protection against establishment which the laws provide and confess their inadequacy to meet constitutional requirements of separation of church and state. *See Johnson* v. *Sanders,* 39 U.S. L.W. 2225 (D. Conn. Oct. 14, 1970).

A reading of the *Walz* case which finds impermissible entanglement in the purchase of secular services plans of Rhode Island and Pennsylvania is consistent with the results reached in *Everson* and *Allen.* In *Everson,* reimbursement to parents for transportation expenses was based upon the same passive and broad classification of beneficiaries as are property tax exemptions for non-profit groups. All parents whose children use public busses to get to and from schools, whether public or private, were eligible; and no determination of secularity was required. No detailed standards or surveillance entered into the arrangement. Eligibility was not subject to constant reevaluation.

In *Allen,* though the validity of the provision of textbooks depended upon findings that they were secular, the degree and kind of entanglement involved would not have

violated the *Walz* test. The decision about the secularity of a text, once having been made, is good for the life of the book. No continuing surveillance and re-evaluation like that involved in monitoring secular instruction is required. A textbook is difficult to analyze for secularity, but it is not nearly as complex and changing as a teacher, nor as variable as course content. Moreover no examination of the internal workings and policies of religious institutions results from textbook evaluation. Perhaps most significantly, under *Allen* a religious school is not prohibited from using a religious text in the same course with the approved secular text. The state is, in a sense, merely saying that the state is funding only the *inclusion* of a secular perspective in the private school program. The purchase of secular services plans, on the other hand, actively *exclude* certain perspectives from a course as a condition of aid, making the effect of entanglement more burdensome to the teacher and a greater interference with the goals of religious schools and their sponsoring churches.

Operational separation of religious from secular teaching by regulation and enforcement is the requirement for a purchase of services plan to satisfy the Establishment Clause; yet that process inevitably entails the practical entanglement which *Walz* prohibits.

Conclusion

For all the reasons stated above Amici ask that the judgment of the District Court in *Robinson* v. *DiCenso* be affirmed, and that the judgment of the District Court in *Lemon* v. *Kurtzman* be reversed or remanded for a full hearing on the Fourteenth Amendment issues. Amici would, however, favor comprehensive state aid to non-public schools as long as the form of that aid respects the First

and Fourteenth Amendment rights of all citizens as presented above. We urge the Court not to foreclose the possibility of such aid.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

VID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of nsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, T. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS RLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMAN-TOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA, MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

[*Parties continued on inside cover*]

APPEAL FROM DISTRICT COURTS OF THREE JUDGES FOR, RESPECTIVELY, THE EASTERN DISTRICT OF PENNSYLVANIA, THE DISTRICT OF CONNECTICUT, THE DISTRICT OF RHODE ISLAND, AND THE DISTRICT OF RHODE ISLAND

MOTION FOR LEAVE TO FILE BRIEF FOR CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, CONNECTICUT CIVIL LIBERTIES UNION, CONNECTICUT COUNCIL OF CHURCHES, CONNECTICUT JEWISH COMMUNITY RELATIONS COUNCIL, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RITA JOHNSON, ROBERT S. EARLEY, DONALD L. WASSMAN, LAURA WILEY HANSEN, WILLIAM MANCHESTER AND EDGAR W. DAVIS, *AMICI CURIAE*

and

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, *et al.*,
Plaintiffs-Appellants,

—VS.—

DAVID H. KURTZMAN, *et al.*,
Defendants-Appellees.

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ELEANOR TAFT TILTON, *et al.*,
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WILLIAM P. ROBINSON, *et al.*,
Defendants-Appellants,

—VS.—

JOAN DICENSO, *et al.*,
Plaintiffs-Appellees.

ON APPEAL FROM THREE-JUDGE UNITED STATES DISTRICT COURT RESPECTIVELY FOR THE EASTERN DISTRICT OF PENNSYLVANIA, THE DISTRICT OF CONNECTICUT, THE DISTRICT OF RHODE ISLAND AND THE DISTRICT OF RHODE ISLAND

MOTION FOR LEAVE TO FILE BRIEF FOR CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, CONNECTICUT CIVIL LIBERTIES UNION, CONNECTICUT COUNCIL OF CHURCHES, CONNECTICUT JEWISH COMMUNITY RELATIONS COUNCIL, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RITA JOHNSON, ROBERT S. EARLEY, DONALD L. WASSMAN, LAURA WILEY HANSEN, WILLIAM MANCHESTER AND EDGAR W. DAVIS, *AMICI CURIAE*

1. *Interest of Amici Curiae*: The *amici* are organizations concerned with the First and Fourteenth Amendments to the Constitution, Black and white parents of children in the public schools, a public school administrator, and taxpayers. They are the original parties plaintiff in *Johnson et al.* v. *Sanders et al.*, Civil Action No. 13,432, in which on November 19, 1970, a three-judge District Court for the District of Connecticut adjudged and decreed that 1969 Public Act 791 (now Connecticut General Statute Section 10-281-a-v, entitled "Non-Public Schools Secular Education Act") is unconstitutional in its entirety, and that defendant state officials are enjoined from contracting with or reimbursing nonpublic schools for the purpose of secular education services pursuant to such Act (—— F. Supp. ——). Previously a motion to dismiss had been granted as to the organizational plaintiffs due to lack of standing. Although the statute was attacked as unconstitutional on both First and Fourteenth Amendment grounds, the Court's decision of unconstitutionality is based only on the Establishment Clause ground. Nevertheless, the Court saw fit to comment on the Fourteenth Amendment ground, as is set forth hereinafter.

Connecticut's statutory scheme for aiding sectarian elementary and secondary schools has significant different from the statutes involved in the above-captioned cases,

but the basic First Amendment questions in *Johnson* are similar. What is very different about *Johnson* is that there is a significant record and developed legal position to support the Fourteenth Amendment claim made explicitly in *Lemon* and implicitly in the other above-captioned cases. The *amici* are cognizant that any decision adverse to Plaintiffs made in the captioned cases would adversely affect their position in *Johnson*. They are concerned that this Court does not presently have before it a reasonably completely developed picture of the facts regarding nonpublic schools education and the applicable law. It is particularly the facts and the law regarding nonpublic school education which gravely bear upon any First Amendment resolution, which Plaintiffs deem vital to bring to the attention of this Court in its consideration of these cases.

The present Plaintiffs in *Johnson* are a number of Connecticut residents and taxpayers including two Black parents and one white parent of children in public schools and a superintendent of a public school system. The organizations which were among the original Plaintiffs, share as common objectives the separation of Church and State and the opposition to the use of public funds for the support in whole or in part of any nonpublic schools, whether sectarian or not, with policies and practices, by purpose or effect, which exclude or otherwise discriminate against persons by reason of race, economic status, or religion.

The picture in Connecticut may be regarded as reasonably representative of nonpublic school education throughout at least a major portion of the United States. The *Johnson* case is the only one presenting a fully developed record on the racial effect of aid to private schools. Thus, the *amici* can argue the clear interrelationship of the Fourteenth Amendment issue to the First Amendment and sup-

port the standing of Plaintiffs in *Lemon* to raise the Fourteenth Amendment issue. A decision with respect to the First Amendment claim in each of the captioned cases will clearly affect their position as will an adverse decision on the issue of standing in *Lemon*. It is primarily evidence of such discrimination in Connecticut which these *amici* seek herein to present. (As Plaintiffs in *Johnson*, they were represented by the undersigned attorneys and Leo Pfeffer.)

2. *Facts and Questions of Law Which Can Only Be Adequately Presented by the Amici.*

It is only these *amici* who have made a Fourteenth Amendment "record" below. The significant Fourteenth Amendment question expressly raised in *Lemon* was foreclosed by the granting of the motion to dismiss for the lack of standing. Furthermore, the *amici* could not earlier present this vital material to this Court.

Although the memorandum of decision in *Johnson* was filed on October 15, 1970, the Court's order was not filed until November 20, 1970. The period for appeal was stayed by the filing of a Motion to Amend Judgment and for a Stay, by Defendant-Intervenors on November 27, 1970, which was denied on December 23, 1970. It would appear that such appeal need not be filed until February 16, 1971. The Attorney-General for Connecticut has repeatedly and publicly stated that *Johnson* will be appealed to this Court. Plaintiffs will join promptly in the request that this Court note probable jurisdiction, and will seek to expedite the appeal.

However, because of the importance of the material the *amici* seek to present, and because the appeal in *Johnson* is apparently not going to be taken until the deadline, Plain-

tiffs' counsel in all the above-captioned cases joined in a heavily documented motion, filed on or about January 25, 1971, to postpone the oral argument scheduled for the session beginning February 22, 1971 until the appeal in *Johnson* was ready for argument. Should the Court deny such motion (to which no counsel for the Defendants consented), it is essential that the Court grant this motion in order that it have presented to it, in brief and argument, the facts and arguments that Plaintiffs' counsel in all the above cases, as well as the *amici*, consider so crucial.

3. *The Relevancy of the Material*:

Johnson includes significant documentary evidence constituting a record and demonstrating that most nonpublic elementary and secondary schools are segregated not only on the basis of religion (if they are denominational as most are) but also on the basis of race, and financial resources. It is believed that the *amici* have established in *Johnson* that the effect of supporting sectarian institutions with tax funds will lead to the ultimate result of promoting two school systems especially in the larger cities—a public school system predominantly black, poor and inadequate, and a nonpublic school system predominantly white, affluent and superior.

Although the Court in *Johnson* did not find for Plaintiffs on the Fourteenth Amendment claim because of alleged lack of standing, which Plaintiffs intend to dispute, it recognized the significance of this issue in its statement appearing in the Memorandum of Decision that this disposition "should not be construed to imply that, assuming a qualified Plaintiff, this Court regards the issue itself as frivolous or without substance." —— F. Supp. —— at ——; Slip Opinion, pp. 24-25.

Plaintiffs in *Lemon* and in *Johnson* have strongly asserted that support of sectarian private institutions violates the Fourteenth Amendment. Although the Fourteenth Amendment issue was not especially raised in the *Tilton* and *DiCenso* cases, it is inherent as a factor to be weighed in any decision therein. This issue would be fully considered as vital to the First Amendment issues in each of the captioned cases because the First Amendment must be recognized as existing in harmony with the Fourteenth Amendment.

Tax support of private sectarian institutions is to be avoided because government will thereby recognize and condone *de jure* or *de facto* discrimination in private schools which the government will finance in part through the purchasing of services or of facilities and equipment; and because government will encourage the establishment of further private schools in which *de jure* or *de facto* discrimination may be practiced while at the same time government funds are being received.

The data in *Johnson* established the discriminatory effect of sectarian private schools. They have relatively few students of other than the sponsoring religion, and the disparity in enrollment of minority groups and economically disadvantaged students is overwhelming. Such data readily show the effect on the public school system, particularly in urban areas. The environmental situation and the ramifications of any Act to support sectarian institutions upon the public education system and upon minority groups cannot be overlooked. *Reitman* v. *Mulkey*, 387 U.S. 360 (1967).

4. *Consent to Filing of Brief by Amici*:

Plaintiffs in the captioned cases consent to the granting of this motion and to the filing of the attached brief by the *amici curiae*.

WHEREFORE, the *amici curiae* respectfully move under Rule 42(3) for permission to file the brief attached hereto.

CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, CONNECTICUT CIVIL LIBERTIES UNION, CONNECTICUT COUNCIL OF CHURCHES, CONNECTICUT JEWISH COMMUNITY RELATIONS COUNCIL, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RITA JOHNSON, ROBERT S. EARLEY, DONALD L. WASSMAN, LAURA WILEY HANSEN, WILLIAM MANCHESTER AND EDGAR W. DAVIS,

By .....

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Their Attorneys

IN THE

Supreme Court of the United States

October Term, 1970

No. 89

ALTON J. LEMON, *et al.*,
Plaintiffs-Appellants,

—VS.—

DAVID H. KURTZMAN, *et al.*,
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—VS.—

JOAN DICENSO, *et al.*,
Plaintiffs-Appellees.

ON APPEAL FROM THREE-JUDGE UNITED STATES DISTRICT COURT RESPECTIVELY FOR THE EASTERN DISTRICT OF PENNSYLVANIA, THE DISTRICT OF CONNECTICUT, THE DISTRICT OF RHODE ISLAND AND THE DISTRICT OF RHODE ISLAND

BRIEF OF

CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, CONNECTICUT CIVIL LIBERTIES UNION, CONNECTICUT COUNCIL OF CHURCHES, CONNECTICUT JEWISH COMMUNITY RELATIONS COUNCIL, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RITA JOHNSON, ROBERT S. EARLEY, DONALD L. WASSMAN, LAURA WILEY HANSEN, WILLIAM MANCHESTER AND EDGAR W. DAVIS, *AMICI CURIAE*

1. *Interest of the Amici*

The *amici* are organizations concerned with the Fourteenth and First Amendments to the Constitution, Black and white parents of children in the public schools, a public school administrator and taxpayers. They are the original parties Plaintiff in *Johnson et al.* v. *Sanders et al.*, Civil Action No. 13,432, in which on November 19, 1970, a three-judge District Court for the District of Connecticut adjudged and decreed that 1969 Public Act 791 (now Connecticut General Statute Section 10-281 a-v, entitled "Nonpublic Schools Secular Education Act") is unconstitutional in its entirety, and that Defendant state officials are enjoined from contracting with or reimbursing nonpublic schools for the purpose of secular education services pursuant to such Act (—— F. Supp. ——). Previously a motion to dismiss had been granted as to the organizational Plaintiffs due to lack of standing. Although the statute was attacked as unconstitutional on both First and Fourteenth Amendment grounds, the Court's decision of unconstitutionality is based only on the Establishment Clause ground. Nevertheless, the Court saw fit to comment on the Fourteenth Amendment ground, as is set forth hereinafter.

Connecticut's statutory scheme for aiding sectarian elementary and secondary schools has significant differences

from the statutes involved in the above-captioned cases, but the basic First Amendment questions in *Johnson* are similar. In *Johnson* there was developed a significant record and legal position to support the Fourteenth Amendment claims made explicitly in *Lemon* and implicitly in the other above-captioned cases. We are cognizant that any decision adverse to Plaintiffs made in the captioned cases would adversely affect our position in *Johnson*. We are concerned that this Court does not presently have before it a reasonably completely developed picture of the facts regarding nonpublic school education and the applicable law. It is particularly the facts and the laws regarding nonpublic school education which gravely bear upon any First Amendment resolution which Plaintiffs deem vital to bring to the attention of this Court in its consideration of these cases.

Those of us who are the present Plaintiffs in *Johnson* are a number of Connecticut residents and taxpayers including two Black parents of children and one white parent in public schools, a superintendent of a public school system. Those of us which are organizations were among the original Plaintiffs, and we all share as common objectives the separation of Church and State and the opposition to the use of public funds for the support in whole or in part of any nonpublic schools, whether sectarian or not, whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race, economic status, or religion.

We seek to present a clear picture of what may happen to our public schools if tax aid to sectarian schools is to be found constitutionally permissible. Government will contribute to the demise of a pluralistic school system and accelerate the growth of separate and unequal school sys-

tems—a public school system predominantly black, poor and inadequate and a nonpublic school system predominantly white, affluent and superior.

The picture in Connecticut may be regarded as reasonably representative of nonpublic school education throughout at least a major portion of the United States. *Johnson* alone presents a fully developed record on the racial effect of aid to private schools. We can readily show the clear interrelationship of the Fourteenth Amendment to the First Amendment and we can support the standing of Plaintiffs in *Lemon* to raise the issue of equal protection. A decision with respect to the First Amendment claim in each of the captioned cases will clearly affect our position as will an adverse decision on the issue of standing in *Lemon*.

2. *The Nature of the Actions*

Lemon is a suit challenging the constitutionality, on its face and as applied, of a law enacted by the Commonwealth of Pennsylvania in 1968 providing for the purchase by the Commonwealth of services of teachers in nonpublic schools. Those teachers whose services are purchased are those teaching certain secular subjects. The Pennsylvania statute contains no provisions requiring the admission of all prospective students, or any provisions forbidding discriminatory enrollment practices. The Plaintiffs include taxpayers and residents of the Commonwealth and a Black parent of a child attending a public school. The complaint asserts that the Statute is unconstitutional in that it violates (1) The Establishment Clause of the First Amendment; (2) The Free Exercise Clause of the First Amendment; and (3) The Equal Protection Clause of the Fourteenth Amendment. Motions to dismiss the complaint were granted on the grounds that the complaint failed to state a claim upon which relief could be granted and that none

of the Plaintiffs had standing to assert the Equal Protection claim.

Tilton is a suit challenging the constitutionality, as applied or on its face if properly applied, of the Higher Education Facilities Act enacted by Congress in 1963 to provide grants for construction of facilities and purchase of equipment at institutions of higher education, both public and nonpublic. The only institutions clearly excluded from eligibility are schools of divinity, and the facilities clearly excluded are those for instruction in religious subjects or for religious worship and dormitories. The Plaintiffs include faculty members in non-sectarian institutions of higher learning which would have received grants had allocated funds not been exhausted by grants to named defendant sectarian colleges. The complaint alleges, *inter alia*, that the named defendant sectarian colleges siphon funds away from non-sectarian colleges which are open to enrollment of persons of all races and of all religions, and that grants to sectarian institutions violate the Free Exercise and Establishment Clauses of the First Amendment. After trial, the three-judge District Court found the Act constitutional as having a primary purpose and effect which was permissible.

The *DiCenso* cases involve the challenge of a Rhode Island law enacted in 1969 providing for the supplementing of salaries of teachers in nonpublic schools. The Rhode Island statute contains no provision requiring the admission of all prospective students or any provision forbidding discriminatory enrollment practices in the schools in which are located the teachers whose salaries are supplemented. The Plaintiffs include taxpayers and parents of children in the public schools. The complaint alleges that the statute is unconstitutional in that it violates the Establishment and

Free Exercise Clauses of the First Amendment. After trial, the three-judge District Court unanimously found the statute unconstitutional as violating the Establishment Clause of the First Amendment.

3. *Questions to Which This Brief Is Addressed*

We will discuss only the following questions relating to the Fourteenth Amendment:

Whether tax support of nonpublic schools violates the Establishment Clause of the Fourteenth Amendment.

Whether taxpayers and parents have standing to present a claim of unconstitutionality under the Fourteenth Amendment without previously having been denied admission of a child to a nonpublic school.

ARGUMENT

Summary of Argument

As will be developed more fully hereinafter, aid to nonpublic schools presents a significant constitutional problem in that it involves the government in the funding of institutions which are nonpublic because they wish to establish their own criteria for operation and admission. By purpose or by effect, such nonpublic schools can be characterized as clearly imbalanced from the standpoint of minority groups, from the standpoint of the economically disadvantaged, and from the standpoint of the educationally disadvantaged. They generally require the payment of tuition and they frequently are to be found in greatest concentration in the middle class white areas. It is not the intent of the *amici* to characterize all nonpublic schools as having an intent to discriminate; but intent is not the question when the effect is so clear.

If government channels its tax funds to maintain and support nonpublic schools which are contributing to racial and economic imbalance in the public schools, it can be expected that further deterioration of the public schools system will occur. Certainly, we have seen the flight of the middle class children from public to nonpublic schools not only in the south but throughout the north. Should government be authorized to contravene the very decisions of this Court regarding the need to develop one pluralistic, equal, open school system for all children, regardless of race, creed, economic status or intellectual ability?

The involvement of government in the funding of such nonpublic schools must be considered state action. That involvement is too intense to say that by funding government does not participate in the improper effect of those schools.

Lastly, it is submitted that any taxpayer, and certainly any parent of a child in the public school system, has standing to press the Fourteenth Amendment claim. The effect of discriminatory enrollment and racial imbalance in the public schools is all too well known. Any Negro parent of a child in a public school system has great reason to be concerned with government action supporting schools which contribute to the racial imbalance of the public schools.

PART I

The Fourteenth Amendment Issue

We submit that any act of Congress or of a state or of a municipality which funds a nonpublic school which by design or effect has discriminatory enrollment practices violates the Equal Protection Clause of the Fourteenth Amendment. Tax support of such schools constitutes "state action" in such discriminatory practices and effects. Neither a state nor Congress can fail to recognize the generally accepted structure of nonpublic schools, particularly those of sectarian character, as being selective or unattractive, and thereby discriminatory, in effect or design, with regard to students of economically disadvantaged, ethnically or religiously or racially distinct backgrounds.

Although nonpublic schools do have a role in education in the United States, can it be doubted that their nonpublic character can destroy their ability to serve the overriding public purpose of supporting institutions designed to provide an education for living in a pluralistic society and to provide equal opportunity for all regardless of race, religion or economic means?

For good reason, the pluralistic society which inhabits this country saw fit to create a strong public school system which is controlled by *all* of the public.[1] That school system clearly must be open to all students equally under the Fourteenth Amendment and it may not provide "separate" facilities for children of different groups.[2] Children of the poor as well as the rich are entitled to the same programs and facilities in such schools. They are governed

[1] *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969).

[2] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

by the will of *all* the people, even those whose children may be enrolled in nonpublic schools.

Thus, the public school system is the bulwark of training for children to live in a pluralistic society. It is subject to many shortcomings, but these shortcomings are amenable to control, criticism, scrutiny and change by any citizen through the elective process and through diligent effort because such schools are *public*.

The Nature of Nonpublic Schools

In *Lemon*, no real record was permitted to be established since a motion to dismiss was granted before answer was filed. Nevertheless, counsel for Lemon *et al.* has provided in his brief at pages 49-54 some information concerning the enrollment situation in Pennsylvania.

In *Johnson*, the *amici* were more fortunate in having access to many documents of the State of Connecticut relating to enrollment of minority groups and the disadvantaged in public and nonpublic schools. The Archdiocese of Hartford had provided the Education Committee of the Connecticut Legislature with its minority enrollment statistics. The Connecticut Association of Independent Schools which appeared *amicus curiae* in *Johnson* also provided information on minority group enrollment in its member schools. All of this data has been submitted as appendices to the motion of the plaintiffs in the above entitled cases to postpone oral argument therein until *Johnson* can be readied for argument concurrently.

It is submitted that the data developed in *Johnson* are reasonably representative of nonpublic school education, and of the imbalance between public and nonpublic schools,

throughout at least a major portion of the United States. To facilitate consideration by this Court, Appendices J-R and Exhibits 8 and 14 have been reproduced as appendices hereto under the *Johnson* designation.

These documents establish that in Connecticut as in Pennsylvania:[3]

> The nonpublic school system is essentially a white school system.
>
> The private non-church-related schools are white schools which have accepted a few Black students.
>
> The Roman Catholic school system has a larger percentage of Black students, but it is essentially segregated with the high Black enrollment being present in a few urban center schools.[4]

In addition, the *Johnson* documents clearly show:

> The economically disadvantaged are overwhelmingly loaded into the public school system.
>
> The sectarian schools have relatively few students of other than the sponsoring religion.

As seen in Appendix J, 84.1 percent of the total enrollment of elementary and secondary school students in Connecticut is in the public school system. Nonpublic schools seeking assistance under the Connecticut Act contain 11.9 percent of the total student enrollment for the state. Of this 11.9 percent of total student enrollment, 87.81 percent were in sectarian schools.

As seen in Appendix K, of the denominational schools applying for aid under the Connecticut Act, 29.5 percent

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[3] Brief for *Lemon et al.*, pp. 49-50.

[4] Many of these schools were selected to be closed by the Archdiocese according to newspaper reports.

has *no* students of any other religious denomination; 35.9 percent had 0-2 percent of their enrollment comprised of students of other religious denominations; 21.2 percent had 2-5 percent comprised by such students; 7.4 percent had 5-10 percent; and 5.5 percent had more than 10 percent.

Turning to the students considered economically disadvantaged, Appendix L shows that economically disadvantaged students comprised only 5.1 percent of the enrollment in the applicant schools in Connecticut. Almost 39 percent of those schools had *no* students who were educationally disadvantaged; 16.6 percent had 0-2 percent of their enrollment comprised of such students; 15.4 percent had 2-5 percent; 13-1 had between 5-10 percent; and only 17 percent had over 10 percent. Appendix M shows the glaring disparity of such enrollment between the public and nonpublic schools in the larger towns.

As seen in Appendix Q, the disparity in enrollment of minority groups between parochial and public schools is overwhelming. Although 16.6 percent of the total student enrollment in the City of Hartford is to be found in the nonpublic schools, 12,411 Blacks or 97.7 percent of all Black students are to be found in the public schools while only 286 or 2.3 percent are in the parochial schools. This is a disparity of 5:1 in the nonpublic schools.[5] In Meriden, 18.1 percent of the student enrollment is in the private schools; all 403 Black students are in the public schools. In New Britain, the nonpublic schools have 18.4 percent of the total students but only 2.7 percent of the Black students. As can be seen from Appendix G to the *Johnson* case accompanying the motion to postpone argument, in many towns there is absolutely no minority enrollment in

[5] As previously indicated, some of these parochial schools containing larger numbers of Blacks are slated to be closed.

parochial schools despite substantial minority group enrollment in the public schools as seen in Appendix F accompanying the motion.

As to the nature of the nonpublic schools in the various states, Appendix R would appear reasonably representative. Of the 379 nonpublic schools with a total enrollment of 125,366 students, 98 schools were nondenominational with a total enrollment of 22,861; 264 schools were Roman Catholic with a total enrollment of 100,262; and 17 schools were affiliated with other religions and had a total enrollment of 2,243.

Nonpublic schools are inherently discriminatory in their enrollment practices and effect. They charge tuition; usually charge extra amounts for books, special equipment and services; often require the wearing of uniforms or specified types of clothing; most usually require certain minimum academic standards for admission; and are located to a large extent in areas which require transportation to, or boarding at, the school in order to attend classes. As a result, such schools obviously are not open to *all* students regardless of race or religion, or financial means even assuming "an open enrollment policy."

Admittedly, some private schools provide tuition assistance to a small percentage of the student body and in some schools the tuition may be small. Nevertheless, the direct and related costs of attending such nonpublic schools effectively deny attendance to potential students from families of limited financial means. Overcoming this financial impediment would require the State to provide far more assistance and incur far greater costs of education in a separate private school system than in the public schools system—certainly this is not likely. Thus, the direct costs

are the first step in ensuring discriminatory enrollment practices.

The Court may also readily ascertain that many (and preferably most) of the nonpublic schools are located outside the areas of the ghetto or financially deprived community. Accessibility of such schools to students is limited unless the parents can afford the costs of transportation and are willing to send their children to remote schools. To overcome this financial impediment, the State must bus the students at its expense to private schools, further increasing the costs of maintaining the private school system —bus service as state expense to all private schools anywhere in the State of Connecticut is most unlikely.

The Court may also recognize that most of the private schools have established certain minimum academic criteria for admission or enrollment. Students who do not meet these criteria are either not admitted or asked to leave the school. In contrast, the public school system sets no minimum academic criteria and is in fact required to provide for students of *all* levels of intellectual capacity. Moreover, many, if not most, private schools cater to persons of certain socio-economic backgrounds and their atmosphere is such as to render uncomfortable those persons who do not fit the established background of the school.

Lastly, most of the nonpublic schools in the United States are religiously affiliated or sectarian schools catering to children of a particular religious persuasion and providing sectarian educational programs in addition to instruction in "secular subjects". This is the avowed purpose for their existence and support by members of that religious persuasion. Many parents may not wish their children indoctrinated to a religion other than their own

(or to any religion) either by direct action or by the subtleties of religious symbols, religious garb, prayers, etc. As a result, students of other religious persuasions or of no religious persuasion obviously are discouraged from seeking enrollment in such institutions.

Any program of governmental aid to nonpublic schools must be considered on the basis of the nature of those schools. We submit that nonpublic schools, by effect or design, are predominantly white, middle class and selective, and that public schools are disproportionately comprised of the minority groups, the poor and the educationally disadvantaged.

The Educational Purpose of the Nonpublic Schools Does Not Balance the Enrollment Imbalance Effect

Dicta in decision of this Court in *Board of Education* v. *Allen,* 392 U.S. 236, have been argued to support aid to nonpublic schools as being appropriate to warrant a test wherein a balancing of public interest is made. Even under such a "test", the public purpose is not served because education is available and open to *all* students in the public schools and because nonpublic schools inherently or by design exclude economically disadvantaged persons, minority groups and students of other religions. The resulting imbalance and the further growth of separate but unequal school systems is not in the public interest and certainly not to be encouraged by tax support.

The legislative draftsman of the Connecticut Act recognized the facts of the situation and the inherent susceptibility to attack of state funding of nonpublic schools because of their enrollment characteristics. He attempted to justify the public interest by including a provision re-

quiring the nonpublic schools to adopt an "open enrollment" policy.[6]

However, even the "open enrollment" policy of the Connecticut Act is only illusory since it contemplates that the "offer" of enrollment shall be sufficient. The regulations of the State of Connecticut[7] adopted pursuant to the Act further evidence the state's recognition of the inherent discriminatory patterns in nonpublic schools[8] and an attempt to balance the state's support by requiring the offer of "open enrollment."

Accordingly, the Connecticut Act *on its face* first recognizes that the nonpublic institutions may have discriminatory enrollment practices giving preference to members of the parish or regular contributors and condones such

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[6] Section 12(d) of the Act states in part:

"The school shall have a policy of open enrollment for all qualified students meeting its academic and other reasonable admission requirements without regard to race, religion, creed, or national origin as follows: *A nonpublic school, which is financially supported by regular contributions made by parishioners or other supporters independent of their children's attendance at the school, may give a preference in admission to children of such parishioners or contributors.* However, said school shall admit each year after the effective date of this act all qualified applicants meeting its academic and other reasonable admission requirements, without any preference given to children of parishioners or contributors, in that number which bears the same proportion to the total number of students admitted as the amount reimbursable to said nonpublic school under this act in the school year prior to the year of admission bears to the total cost of operating that school in that year. . . ." [Emphasis Added]

[7] Section 3(h) of the Connecticut Act states:

"'Open enrollment' means *the offer* by a school of the opportunity of admission *to any qualified student meeting its academic and other reasonable admission requirements,* to the extent required by this act, without regard for race, religion, creed or national origin." [Emphasis Added]

[8] Appendix E, submitted with the Motion to Postpone Argument, Sec. 10-281n-7.

practices; then it requires only that the institution announce an "open enrollment" policy. Then, it allows the institution to establish *as a requirement for admission* academic and other "reasonable" admission requirements. Is the Fourteenth Amendment any less applicable to educationally deprived students who may not meet the "academic standards" of the nonpublic school? Is it any less applicable to poor children who cannot meet the tuition requirements of the nonpublic school? Is it any less applicable to children who would be discomforted by the prevailing religious or "social" atmosphere of some nonpublic schools? Is it any less applicable to children who do not meet other "reasonable" requirements of the nonpublic school?

It is submitted that the permission of impermissible conduct in excluding by design or effect of students who are economically deprived, who are of other religions or who do not meet "reasonable" admission requirements violates the absolute prohibitions of the Fourteenth Amendment and constitutes improper state action:

> "No State shall make or enforce any law which shall... deny to any person within its jurisdiction the equal protection of the law."

The Entire Pattern of State Involvement in the Operation of the Nonpublic Schools Establishes Their Discriminatory Practices as State Action

It has been contended that government involvement in the operation of the nonpublic schools does not constitute state action. Interestingly, the basis for seeking state support was that the nonpublic schools were performing a

public function, i.e., that of providing an education which is required of all children in the state between some specified ages, and that the state is required to provide such an education to all children. Primary and secondary education is a state function required of the state (or its towns). In some states, a university education is to be provided by the state.

An institution " . . . takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matter of private law because they are performed by a [private] party." *Smith* v. *Allwright*, 321 U.S. 649, 663 (1944). The state governments require an education and require the municipality to provide such an education by the maintenance of public schools. Generally, the parent is required to enroll his child in a public school unless he is able to show that the child is elsewhere receiving equivalent instruction to the studies taught in the public schools.[9] Generally, the penalty is provided for failure of the parent to comply.[10] In many states such as Connecticut, deprivation to a student by a town of public schooling can result in forfeiture of state support.[11]

Generally, the nonpublic school can provide this educational function and relieve the parent of the requirement that he enroll his child in the public schools unless the nonpublic schools are found by the state to provide equivalent instruction in the studies taught in the public schools.[12] This clearly establishes the power of the state to close down, at least to Connecticut students, any nonpublic

[9] See for example Conn. General Statutes §10-184.

[10] See for example Conn. General Statutes §10-185.

[11] See for example Conn. General Statutes §10-186.

[12] See for example Conn. General Statutes §10-184.

schools of which it does not approve by denying that school to parents as an alternative to the public schools to which they are required to send their children. In most, if not all states, the state is directly and omnipotently involved in the acts of the nonpublic schools by the granting of approval to nonpublic schools practicing discriminatory enrollment practices. There can be no doubt that the state is "significantly involved" in that discrimination contrary to the provisions of the Fourteenth Amendment.

The state thus has through its body of laws elected to ". . . place its power, property and prestige behind the institution." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). In at least some states, they provide nonpublic schools with health and welfare services of professional personnel, such as doctors, nurses, psychologists and social workers.[13] The federal government and at least some states provide significant financial support through the granting of aid to nonpublic schools for programs directed to "disadvantaged children".[14] Some states provide motor vehicle courses for all students.[15]

The state may require that all public and nonpublic schools teach in the English language;[16] and that they teach a course of instruction in the duties and responsibilities of United States citizenship.[17] The state may require clean and sanitary practices in each schoolhouse and for inspec-

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[13] See for example Conn. General Statutes §10-217a.

[14] Congress has enacted The Elementary and Secondary Education Act of 1965, PL 89-10. As to a state act, see for example Conn. General Statutes §10-266a.

[15] See for example Conn. General Statutes §10-24.

[16] See for example Conn. General Statutes §10-16.

[17] See for example Conn. General Statutes §10-18.

tion by the State Board of Education or local Board of Education.[18] The state may permit a community to have a referendum and then to pay for busing of students to nonpublic schools.[19] The state may require appliances and devices for eyeprotection in laboratories and workshops of all public and private schools.[20]

In other instances, the state involvement in the operation and support of the nonpublic schools may be covert such as the elimination of private school vehicles from the statutory definition of motor vehicles[21] and attendant exemptions from State requirements for such vehicles. However, in every instance, there is still State support and involvement in the operation of nonpublic schools.

Clearly there can be no question that the entire pattern of involvement of government in the operation and support of nonpublic schools establishes such schools as instrumentalities of State action. As such, discrimination by such state-supported nonpublic schools is not purely private discrimination since there is the requisite nexus between the State and the nonpublic schools to create a Fourteenth Amendment violation. To have government so deeply involved in the control and support of such institutions and then to deny the application of the Fourteenth Amendment on the grounds that such institutions are not instrumentalities of the government is pure institutionalized hypocrisy in an arbitrary distinction in the application of the powers of the state.

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[18] See for example Conn. General Statutes §10-203.

[19] See for example Conn. General Statutes §10-281.

[20] See for example Conn. General Statutes §10-214a.

[21] See for example Conn. General Statutes §16-324.

The nonpublic schools are not purely private. The rationale behind acts to provide financial assistance is that they perform public functions and that they are public instrumentalities; therefore they must meet state standards of protection against discriminatory practices not only to the extent of state support but to the fullest extent since they seek and obtain governmental assistance. Government should not be allowed to circumvent its duty to refrain from active violation of the Fourteenth Amendment, and in fact to seek an end to all violation thereof, by "merely" maintaining and encouraging the growth of nonpublic schools.

Financial Support of Institutions With Discriminatory Enrollment Patterns Is Prohibited State Action

In *Burton* v. *Wilmington Parking Authority,* this Court dealt with a parking garage and stated:

> "Only by shifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance.
>
> " . . . no state may effectively abdicate its responsibilities by either ignoring or by merely failing to discharge them; whatever the motive may be it is no consolation to the individual denied equal protection of the laws that it was done in good faith" (at page 725).

Certainly, the role of the State in expressly recognizing and condoning discriminatory enrollment practices and in permitting the imposition of academic and other reasonable academic standards is no less a non-obvious involvement.

The role of government in enacting nonpublic school aid statutes and in supporting such institutions can be readily compared with the action of the State of California in passing a constitutional amendment which would have permitted private persons to discriminate in their real estate transactions, *Reitman* v. *Mulkey.*

Can there be any question that the State's involvement in, and condoning of, discriminatory enrollment practices is any less objectionable than that State action found improper in *Poindexter et al.* v. *Louisiana Financial Assistance Commission et al.,* 258 F. Supp. 158, 164 (E.D. La. 1966) wherein the Court stated:

> "A segregated school predominantly supported by state funds is a *fortiori* case of unconstitutional state action. But any amount of state support to help found segregated schools or to help maintain such schools is sufficient to give standing to Negro school children to file the kind of complaint filed in this case."

Of similar import and effect is *Coffey et al.* v. *State Educational Finance Commission et al.,* 269 F. Supp. 1389 (S.D. Miss. 1969):

> "The statute, as amended, encourages, facilitates, and supports the establishment of a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools."
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> • • • • •
>
> "There is no claim in this case that the constitution requires all children to attend public schools, or that a private citizen may not select a private segregated school for his child because of the desire to keep the child from being educated with children of a different

> race. What is involved here are legislative enactments which 'will significantly encourage and involve the State in private discriminations.'" *Reitman* v. *Mulkey*, 387 U.S. 369, 381, 87 S. Ct. 1627, 1634, 19 L. Ed.2d 830, 838 (1967) (p. 1392).

In *Cooper* v. *Aaron*, 358 U.S. 1 (1958) this Court struck down efforts to delay implementation of plans for desegregating schools and held that the local school boards and superintendents of schools stood as agents of the State:

> "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' Ex parte Virginia, 100 U.S. 339, 347, 25 L. Ed. 676. Thus, the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see Virginia v. Rives, 100 U.S. 313, 25 L. Ed. 667; Com. of Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230, 77 S. Ct. 806;

L. Ed.2d 792; Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; or whatever the guise in which it is taken, see Derrington v. Plummer, 5 Cir., 240 F.2d 922; Department of Conservation and Development v. Tate, 4 Cir., 231 F.2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' Smith v. Texas, 311 U.S. 128, 132, 61 S. Ct. 164, 166, 85 L. Ed. 84."

Can there be any doubt at this point that the government has chosen to use the nonpublic schools as an instrumentality for conducting the program and purpose of education? Can there be any doubt that the government has become significantly involved in statutorily recognizing and condoning the discriminatory enrollment policy or effect of nonpublic schools which it funds to a substantial degree and which it controls and supervises to a substantial degree?

The Facts Establish That Governmental Aid to Nonpublic Schools Constitutes a Violation of the Fourteenth Amendment

There can be no doubt that the state aid statutes for nonpublic schools were enacted to support nonpublic schools and that such schools were known and recognized to have discriminatory enrollment patterns or practices. Moreover, it should be noted that the Fourteenth Amendment is not

limited to "race or religion"—the Fourteenth Amendment is absolute:

> "No State shall make any or enforce any law which shall . . . deny to *any person* within its jurisdiction the equal protection of the law."

Every child is entitled to a primary and secondary education at State expense in institutions which are open for admission to *all persons* without respect to any criteria for admission except as to residence and as to conduct which would justify expulsion. Is a poor person any less a person to be protected by the Fourteenth Amendment? Is a person with an academic level less than "reasonable academic standard" a person who should not be protected by the Fourteenth Amendment? Thus, state aid to nonpublic schools opens up a field of discriminatory effects for a new group of second class citizens.

We have pointed out the character of the nonpublic schools throughout the State of Connecticut. From the information set forth hereinbefore, the overall pattern of discriminatory enrollment in nonpublic schools is quite evident. Economically disadvantaged students are by far crowded into the public schools. The sectarian schools have relatively few students other than the sponsoring religion.

This Court recognized the invidious activity that could result from state support of private schools in *Cooper* v. *Aaron* at page 19:

> "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student

not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law."

Since the enunciation in *Brown* v. *Board of Education* that separate educational facilities are inherently unequal, a number of cases have enunciated the requirement that the state take positive action to end *de facto* segregation.[22] The state's obligation is to strengthen the public school system which is open to all students—not to fund and support institutions which have, by effect or design, discriminatory enrollment practices. Such conduct is clearly violative of the Fourteenth Amendment.

PART II

The Issue of Standing to Sue

We submit that the Plaintiffs in *Lemon*, we as Plaintiffs in *Johnson* and, in fact, the taxpayers and parents in *Tilton* and *Di Censo* have standing to present a claim for violation of the Equal Protection Clause of the Fourteenth Amendment. The decision of this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968) made clear that citizens should not be deprived of the right to present Constitutional attacks upon legislative acts. We submit that the District Court in *Lemon* (and the District Court in *Johnson*[23]) erred in find-

[22] E.g., *Block* v. *Board of Education*, 226 F. Supp. 208 (E.D. N.Y. 1964); *Branch* v. *Board of Education*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Hobson* v. *Hanson*, 269 F. Supp. 401 (D.C. D.C. 1967), affirmed and modified 408 F.2d 175 (1969), appeal dismissed 392 U.S. 801 (1969).

[23] The decision of the Court is of interest at page 25 of the Slip Opinion:

Under the circumstances we are constrained to hold that none of the plaintiffs has standing to raise the Equal Pro-

ing that the Plaintiffs lacked standing to present Fourteenth Amendment issues in the absence of having a child refused admission to a private school aided under the Act.

Any Negro Parent of a Child in the Public Schools Has Standing

Alton Lemon in *Lemon* clearly is a Negro parent of a child in the public school system. As such, he is vitally interested in the viability of that system and he is vitally interested in preventing that system from becoming segregated through flight of white middle class children to the nonpublic schools. The manner in which this harm affects a Negro parent is readily demonstrable.

The *amici* Robert S. Early and Rita Johnson are similarly situated and had the opportunity to file affidavits on this issue in *Johnson* (appended hereto respectively as Appendices N and P). As cogently stated therein, a Negro parent of children in the public school system is injured by the fact that tax aid to nonpublic schools siphons off significant financial support to the public school system in which his child is enrolled, thereby rendering it less effective than it might otherwise become if fully funded.

Providing tax support for nonpublic schools with restrictive enrollment practices or requirements which produce

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tection issue. If one of them had been the parent of a Negro child who, though otherwise qualified, had been denied admission to a secular class, purchased by the State, at a contracting school because the "open" enrollment quota was filled, there would have been a clear-cut collision of interests and we would have been presented with an Equal Protection question, the nature of which is disclosed in the evidentiary material supporting the plaintiffs' motion for summary judgment. For the most part the attack is directed at the admissions provisions contained in §12 of Public Act 791.

atypical enrollment presently injures the public school system and will injure it even more severely as time progresses. The disproportionate enrollment of minority group students in urban schools has produced a marked tendency for white middle class parents to enroll their children in nonpublic schools or to move to suburban communities. This, in turn, produces a snowballing reaction in that the school system suffers as balance and widespread community support and interest are destroyed, causing further flight of the white middle class (and indeed some of the Black middle class) from the public school system. This imbalance cannot help but promote and aggravate imbalance in the public schools which his child attends and reduce the opportunity for his child to obtain the best possible education in a pluralistic environment.

A Black parent is further aggrieved by the requirement that he pay taxes directly or indirectly for the support of nonpublic institutions having such enrollment imbalance and as to which he has no effective voice. In contrast to the public school system which has a board of education which a Black parent directly or indirectly elects and which is partially responsible to the officials which he elects and to which he may direct his grievances and of which he can attend meetings, the nonpublic schools are truly nonpublic. A Black parent has no voice in their operation, no control over their actions, and no way to challenge their practices except by the present actions when they seek and obtain substantial governmental aid.

In the urban communities, it will be shown hereinafter that there is great imbalance of minority group and economically deprived students between the public and nonpublic schools. The disproportionate enrollment is the result of white middle class parents who withdraw their

children from the public schools to move them to nonpublic schools or who move their families to suburban communities. As a result, broad based community support for the urban public schools is weakened and the effect is one which snowballs as public confidence is further destroyed and as a racial imbalance begins to pyramid.

The insidious effect of discriminatory enrollment in the nonpublic schools does not require denial of admission to the children of a plaintiff or denial of employment to a plaintiff to provide him with standing to challenge an act providing tax funds to such an institution. It is enough that there is demonstrable injury or likelihood of injury to the public schools in which their children are enrolled. It is enough that there is a failure to educate in accordance with the needs of a pluralistic society in a system which fosters integration and universal social concepts. It is enough that government certainly destroys the great opportunity of government to promote racial and minority group understanding. These points are stressed by Edgar W. Davis, a person long associated with the cause of public education here in the United States, who submitted an affidavit in *Johnson* on the issue which is appended hereto as Appendix O.[24]

There can be little doubt that any Congressional or State act violates the Fourteenth Amendment by supporting in-

[24] As stated therein, tax support for nonpublic schools siphons off funds sorely needed by public schools and will contribute to the deterioration of confidence therein. To his own knowledge, nonpublic schools are selective in admission and impose tuition and other costs which are prohibitive to economically deprived persons. Since the public school system is charged with, and tends to foster integration and universal social concepts, producing an imbalance on religious, ethnic, racial or academic bases would materially impair efforts of the public school system and of the public generally to improve social balance and universal social awareness and justice.

stitutions which do not serve the needs of the entire public and which are not open to all persons. The result of any such act is an increase in the likelihood of two school systems—a public school system predominantly poor, inadequate and imbalanced by the number of economically disadvantaged, academically disadvantaged and minority students; and a nonpublic school system predominantly white, affluent and academically selective.[25]

Must a parent do that which offends his conscience in order to obtain standing to challenge a law using his tax funds for an unconstitutional purpose? As pointed out by the *amici* Johnson and Early in their affidavits, they have not attempted to enroll their children in a nonpublic school because they are committed to an educational system which is open to all and which strives to maintain a multiethnic character and approach to the problems of education and community development. In contrast, they strongly believe that the nonpublic schools are racially and otherwise segregated either by religious or other requirements, or by residential patterns. They strongly believe that the student body of most nonpublic schools includes a disproportionate number of students from relatively affluent and Caucasian backgrounds relative to the number of students from financially and educationally deprived Black and Puerto Rican backgrounds.

Thus, any Black parent of a child in a public school system meets the test of standing most clearly stated in *Flast* v. *Cohen* at pages 102-106. In dealing with a federal taxpayer suit based upon the First Amendment, this Court found that the taxpayers had standing stating:

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[25] The substance of this language appears in Paragraph 5 of the complaint in *Lemon* and Paragraph 25 of the Complaint in *Johnson*.

"The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked.

* * * * *

"Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

* * * * *

"The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review."

In *Lemon* (and in *Johnson*) the Black parent is a taxpayer and can establish that the questions act violates the Fourteenth Amendment and that this violation directly affects him. It is submitted that any parent with children in the public school system will be adversely affected by

State support of nonpublic institutions which inherently develop or practice discriminatory enrollment. All taxpayers are adversely affected who desire the children of this country to attend schools wherein they may be prepared for an adult life in a pluralistic and socially responsible environment determined by a pluralistic public body. Any taxpayer is damaged and aggrieved by being compelled to pay taxes for the support of institutions with discriminatory enrollment practices which he feels unconscionable. Any taxpayer is aggrieved by being compelled to pay taxes for the support of nonpublic institutions as to the operation and policies of which he has no voice. Thus, the plaintiffs in *Lemon* (and in *Johnson*) have established the nexus required for standing.

Moreover, the Court's attention is invited to *Poindexter v. Louisiana Financial Assistance Commission et al.*, 258 F. Supp. 158 (E.D. La. 1966), wherein the Court had no difficulty in establishing the standing of the plaintiffs to challenge the state action involved, although there is no allegation to indicate that any of the plaintiffs or their children were denied admission. Also of interest is the statement of the Court of Appeals for the Second Circuit in *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 927 (1968):

> "The plaintiffs in the case before us are in a very different position. Their stake in the outcome of the case is immediate and personal, and the right which they allege has been violated—the right not to be subjected to racial discrimination in government programs—is one which the courts will protect. Their standing to sue is clear."

We submit that Alton Lemon in *Lemon* (and Robert S. Early and Rita Johnton in *Johnson*) have clear standing to present a claim of unconstitutionality under the Fourteenth Amendment.

Any Taxpayer Should Have Standing to Challenge an Act Siphoning Off His Tax Funds for an Unconstitutional Purpose

It would seem that the decision of this Court in *Flast* v. *Cohen* finally put to rest the ritualistic requirements for standing where a grave constitutional issue is presented and where there is a logical nexus between the taxpayer and the enactment attacked:

> "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." [26]

Does a parent have to be Black to be adversely affected by racial imbalance in the public schools? Does a taxpayer have to enjoy the status of having children enrolled in the public schools to be concerned with their viability and their effectiveness in attaining the goals of a pluralistic society?

Any taxpayer is adversely affected when he desires the children of this country to attend schools wherein they may be prepared for an adult life in a pluralistic and socially responsible environment. Any taxpayer is damaged and aggrieved by being compelled to pay taxes for the support of institutions with racial imbalance or discriminatory enrollment practices which he feels are unconscionable. Any

[26] *Id.* at p. 106.

taxpayer is aggrieved by being compelled to pay taxes for the support of nonpublic institutions as to the operation and policies of which he has no voice. Their interest is not remote; the issues are of grave concern to the plaintiffs in *Lemon* (and in *Johnson*) and to citizens throughout the United States. Thus, the taxpayers of *Lemon* (and of *Johnson*) have established the nexus required for standing.

CONCLUSION

The judgments of the District Courts in *Lemon* and *Tilton* should be reversed and the decisions of the District Court in *Di Censo* should be affirmed.

Respectfully submitted,

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February 1, 1971

APPENDICES

ENROLMENT STATISTICS

ENROLLMENT STATISTICS

In Public Schools	655,000 or 84.1% of Total Student Enrollment
In All Non-Public Schools	124,000 or 15.9% of Total Student Enrollment
Total Student Enrollment in State	779,000
In Applicant Schools	93,344 (90,188 Conn. residents) or 11.9% of Total Student Enrollment
Breakdown of Applicant Schools	
In Non-Denominational	11,373 or 12.18% of Total Enrollment in Applicant Schools
In Denominational	81,971 or 87.81% of Total Enrollment in Applicant Schools
Roman Catholic	80,954 or 86.72%
Other	1,017 or 1.09%

SECTARIAN APPLICANT SCHOOLS

Total Number of Sectarian Schools	217 or 83.8% of Total Applicant Schools
Total Enrollment in Such Schools	81,971
Students Not of Sponsoring Religion	2,054 or 2.51% of Enrollment in Such Schools

STUDENTS NOT OF SPONSORING RELIGION

As Percentage of Student Body	No. of Schools with Student Percentage	Schools as Percentage of 217 Sectarian Schools
0	64	29.5
0 -2.0	78	35.9
2-5	46	21.2
5-10	16	7.4
over 10	12	5.5

(1 School Not Classifiable)

DISADVANTAGED ENROLLMENT IN APPLICANT SCHOOLS

Total Number of Applicant Schools	**259**
Total Connecticut Resident Enrollment	**90,188**
Enrollment of Educationally Deprived	**4,634** or 5.1% of Total State Enrollment in **Such** Schools

EDUCATIONALLY DEPRIVED STUDENTS

As Percentage of Conn. Students	No. of Schools with Student Percentage	Schools as Percentage of 259 Applicant Schools
0	98	37.8
0 - 2	43	16.6
2 - 5	40	15.4
5 - 10	34	13.1
over 10	44	17.0

DISTRIBUTION OF DISADVANTAGED CHILDREN IN LARGER TOWNS (OVER 10,000 STUDENTS)

(STATE AID TO DISADVANTAGED CHILDREN)

(Figures Based Only Upon Number of Children Receiving Aid to Dependent Children)

Town	Total Number of Students	Percentage Enrollment Public Schools	Private Schools	Total Number of ADC Students	Percentate ADC Enrollment Public	Non-Public
Bridgeport	35,242	71.0	29.0	3,967	92.1	7.9
Bristol	15,251	78.1	21.9	270	95.9	4.1
Danbury	13,468	77.9	22.1	492	96.1	3.9
East Hartford	13,767	91.9	8.1	362	98.9	1.1
Enfield	15,191	86.7	13.3	321	92.5	7.5
Fairfield	15,356	76.4	23.6	132	87.1	12.9
Greenwich	15,575	70.9	29.1	96	93.8	6.2
Groton	10,085	93.0	7.0	193	--	--
Hamden	11,742	83.2	16.8	217	91.2	8.8
Hartford	34,962	82.0	18.0	8,218	96.6	3.4
Manchester	12,207	81.9	18.1	306	92.2	7.8
Meriden	13,533	81.8	18.2	562	95.7	4.3
Milford	14,661	86.6	13.4	320	98.8	1.2
New Britain	18,018	80.7	19.3	1,011	97.5	2.5
New Haven	29,159	74.0	26.0	5,296	94.6	5.4
Norwalk	20,580	85.5	14.5	964	98.9	1.1
Norwich	10,664	57.0	43.0	558	94.4	5.6
Stamford	27,735	75.9	24.1	1,309	99.6	0.4
Stratford	11,549	84.4	15.6	180	94.4	5.6
Wallingford	10,130	88.5	11.5	161	97.5	2.5
Waterbury	25,796	68.6	31.4	1,750	91.1	8.9
West Hartford	17,695	74.0	26.0	66	74.2	25.8
West Haven	12,014	79.2	20.8	487	90.6	9.4

APPENDIX N

Affidavit of Robert S. Early

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 13422

CONNECTICUT CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

—VS.—

WILLIAM J. SANDERS, Secretary of the State Board of Education of the State of Connecticut, *et al.*,

Defendants.

STATE OF CONNECTICUT,
COUNTY OF , *ss.*

ROBERT S. EARLY, being duly sworn, deposes and says as follows:

1. He is one of the Plaintiffs in the captioned action and resides at 25 Hillside Avenue, Vernon, Connecticut 06086.

2. He is a Black American, a taxpayer of the State of Connecticut and he has one child enrolled in the public schools of Vernon.

3. His conscience is offended by Public Act 791 and he strongly feels that this Act injures him as a taxpayer and injures the public school system in which his child is enrolled and to which he is deeply committed. This Act

siphons off significant financial support from the public school system in which his child is enrolled, thereby rendering it less effective than it might otherwise become if fully funded.

4. By supporting non-public schools with restrictive enrollment practices or requirements which produce atypical enrollment, this Act presently injures the public school system and will injure it even more severely as time progresses. The disproportionate enrollment of minority group students in urban schools has produced a marked tendency for white middle class parents to enroll their children in non-public schools or to move to suburban communities. This, in turn, produces a snowballing reaction in that the school system suffers as balance and widespread community support and interest are destroyed, causing further flight from the public school system.

5. He has not attempted to enroll his child in a non-public school because he is committed to an educational system which is open to all and which strives to maintain a multiethnic character and approach to the problems of education and community development. In contrast, he strongly believes that the non-public schools are racially and otherwise segregated either by religious or other requirements or by residential patterns. He strongly believes that the student body of most non-public schools includes a disproportionate number of students from relatively affluent and caucasian backgrounds relative to the number of students from financially and educationally deprived black and Puerto Rican backgrounds based upon the urban areas in which they relocated. This imbalance cannot help but promote and aggravate imbalance in the public schools which his child attends and reduce the opportunity for his child to obtain the best possible education in a pluralistic environment.

6. He is grievously concerned over the lack of understanding of racial and economic problems faced by minority groups in this country. He firmly believes that non-public schools do little if anything to create an understanding and awareness of the problems of the minority groups and thereby fail to improve the lot of his race or of other minorities.

7. He is further aggrieved by the requirement that he pay taxes for the support of institutions following such discriminatory practices and as to which he has no effective voice. In contrast to the public school system which has a board of education which he elects and which is partially responsible to the Mayor and Board of Representatives which he elects and to which he may direct his grievances and of which he can attend meetings, the non-public schools are truly non-public. He has no voice in their operation, no control over their actions, and no way to challenge their practices except by the present action when they seek and obtain substantial state aid.

8. He reaffirms all of the allegations of Paragraph 18-26 of the complaint herein as being true to the best of his knowledge and believes they provide the basis upon which he feels he is aggrieved under the Fourteenth Amendment to the United States Constitution.

/s/ Robert S. Early
Robert S. Early

Sworn and subscribed to before me this 23rd day of June, 1970.

/s/ Elizabeth L. Bellinger
Notary Public

My Commission Expires Mar. 31, 1974

APPENDIX

Affidavit of Edgar W. Davis

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 13432

CONNECTICUT CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

—vs.—

WILLIAM J. SANDERS, Secretary of the State Board of Education of the State of Connecticut, *et al.*,

Defendants.

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, *ss.*:

EDGAR W. DAVIS, being duly sworn, deposes and says as follows:

1. He is one of the Plaintiffs in the captioned action and resides at Dean Road, East Lyme.

2. He is a taxpayer of the State of Connecticut and is Superintendent of Schools for the Town of East Lyme. He has been engaged in management in the public schools for twenty years. He has served as President of the Connecticut Association of Public School Superintendents and is an active member thereof. He is immediate past president of the Horace Mann League of America, Inc., a national organization dedicated to the preservation and improvement of public school education.

3. His conscience is offended by Public Act 791 and he strongly feels that this Act injures him as a taxpayer and

injures the public school systems by which he is employed and to which he is deeply committed.

4. Public Act 791 definitely has siphoned off financial support from the public school systems at a time when Connecticut already lags behind the national average for state support of public schools. In Connecticut state support is approximately 26 percent of the cost of operation, whereas the national average is approximately 40 percent.

5. Further dimunition in support for the public schools will further adversely affect the public schools and cause the deterioration of the quality of education and public confidence therein.

6. He has personally observed that non-public schools produce racially, economically and academically inbalanced schools in that:

a. Non-public schools cater to students of higher academic capabilities and reject students who then enroll in the public school system. As a result, they siphon off a proportion of students with higher academic capabilities and create an inbalance in the public schools with respect to the spectrum of academic capabilities.

b. Diocesan high schools generally establish quotas as to the number of children that will be enrolled from any one parish.

c. Non-public schools generally charge tuition and impose other costs which often are prohibitive to economically deprived persons so that economically disadvantaged children constitute a far greater proportion of the students in the public school system.

d. The public school system is charged with, and tends to foster the integration and universal social concepts.

Producing an inbalance on religious, ethnic, racial or academic bases would materially impair efforts of the public school systems and of the public generally to improve social balance and universal social awareness and justice. Public school systems generally tend to utilize multi-ethnic curricula and approaches to the problems of educational and community development.

7. He strongly believes that aid rendered to non-public schools will promote invidious discrimination and segregation by supporting private schools presently in existence by permitting some of these schools to increase their enrollment and by fostering the creation of new non-public schools.

8. He strongly believes that this Act will aggravate the inbalance which already exists in the public school system and strengthen the tendency for some parents to enroll their children in non-public schools, further increasing the likelihood of two school systems, especially in the larger cities of the State—a public school system predominately poor, inadequate and imbalanced by the number of economically disadvantaged, academically disadvantaged, and minority students and a non-public school system predominantly white, affluent and academically selective.

/s/ Edgar W. Davis
Edgar W. Davis

Sworn and subscribed to before me this 19th day of June, 1970.

Lewis Rabinovitz
Notary Public

Lewis Rabinovitz
Notary Public
My Commission Expires Mar. 31, 1971

APPENDIX P

Affidavit of Rita Johnson

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 13432

CONNECTICUT CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

vs.

WILLIAM J. SANDERS, Secretary of the State Board of Education of the State of Connecticut, *et al.*,

Defendants.

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, *ss.*

RITA JOHNSON, being duly sworn, deposes and says as follows:

1. She is one of the Plaintiffs in the captioned action and resides at 1562 Albany Avenue, Apartment B 2, Hartford, Connecticut 06112.

2. She is a taxpayer of the State of Connecticut and she has one child enrolled in the public schools of Hartford. The school in which her child is enrolled has an overwhelmingly large proportion of Negro children. She is a Black American.

3. Her conscience is offended by Public Act 791 and she strongly feels that this Act injures her as a taxpayer and injures the public school system in which her child is en-

rolled and to which she is deeply committed. This Act siphons off significant financial support from the public school system in which her child is enrolled, thereby rendering it less effective than it might otherwise become if fully funded.

4. By supporting non-public schools with restrictive enrollment practices or requirements which produce atypical enrollment, this Act presently injures the public school system and will injure it even more severely as time progresses. The disproportionate enrollment of minority group students in urban schools has produced a marked tendency for white middle class parents to enroll their children in non-public schools or to move to suburban communities. This, in turn, produces a snowballing reaction in that the school system suffers as balance and widespread community support and interest are destroyed, causing further flight from the public school system.

5. She has not attempted to enroll her child in a non-public school because she is committed to an educational system which is open to all and which strives to maintain a multiethnic character and approach to the problems of education and community development. In contrast she strongly believes that the non-public schools are racially and otherwise segregated either by religious or other requirements or by residential patterns. She strongly believes that the student body of most non-public schools includes a disproportionate number of students from relatively affluent and caucasian backgrounds relative to the number of students from financially and educationally deprived black and Puerto Rican backgrounds based upon the urban areas in which they relocated. This imbalance cannot help but promote and aggravate imbalance in the public schools which her child attends and reduce the opportunity

for her child to obtain the best possible education in a pluralistic environment.

6. She is grievously concerned over the lack of understanding of racial and economic problems faced by minority groups in this country. She firmly believes that non-public schools do little if anything to create an understanding and awareness of the problems of the minority groups and thereby fail to improve the lot of her race or of other minorities.

7. She is further aggrieved by the requirement that she pay taxes for the support of institutions following such discriminatory practices and as to which she has no effective voice. In contrast to the public school system which has a board of education which she elects and which is responsible to the City Council which she elects and to which she may direct her grievances and of which she can attend meetings, the non-public schools are truly non-public. She has no voice in their operation, no control over their actions, and no way to challenge their practices except by the present action when they seek and obtain substantial state aid.

8. She reaffirms all of the allegations of Paragraphs 18-26 of the complaint herein as being true to the best of her knowledge and believes they provide the basis upon which she feels she is aggrieved under the Fourteenth Amendment to the United States Constitution.

/s/ Rita Johnson
Rita Johnson

Sworn and subscribed to before me this 23rd day of June, 1970.

Lewis Rabinovitz
Notary Public

Lewis Rabinovitz
Notary Public
My Commission Expires Mar. 31, 1974

APPENDIX Q

(See opposite) ☞

Public School	Private School	Total	Public Schools Black Pupils	Private Schools Black Pupils

Town	Total Enrollment	Public School Enrollment Number	Public School Enrollment Percent	Private School Enrollment Number	Private School Enrollment Percent	Total Number Black Pupils	Public Schools Black Pupils Number	Public Schools Black Pupils Percent of Total In Town	Private Schools Black Pupils Number	Private Schools Black Pupils Percent of Total In Town	Public School Percent Spanish Enrollment	Private School Percent Spanish Enrollment
Hamden	11,070	9,579	86.5	1,491	13.5	484	468	96.7	16	3.3	.3	.2
Hartford	33,612	28,034	83.4	5,578	16.6	12,697	12,411	97.7	286	2.3	16.0	4.8
Meriden	13,506	11,066	81.9	2,440	18.1	403	403	100.	0	0.	6.4	3.1
New Britain	18,016	14,694	81.6	3,322	18.4	1,124	1,094	97.3	30	2.7	7.0	1.8
New Haven	27,173	21,184	78.0	5,989	22.0	11,401	10,745	94.2	656	5.8	6.9	1.3
Waterbury	25,225	17,699	70.2	7,526	29.8	3,410	3,280	96.2	130	3.8	6.7	.9
West Haven	11,827	9,353	79.1	2,474	20.9	661	642	97.1	19	2.9	.8	0
Total	140,429	111,609	79.5	28,820	20.5	30,180	29,043	96.2	1,137	3.8		

Column (1) equals (2) plus (3)
Column (2) and (5) - Appendix F
Column (3), (6) and (8) - Appendix G
Column (4) equals Columns (5) plus (6)
Column (7) - 1969-70 Figures of Appendix F

MINORITY ENROLLMENT

NON-PUBLIC SCHOOLS 1968-1969

Total Number of Schools	379
Total Enrollment	125, 366

	Number of Schools	Total Enrollment
Non-denominational	98	22, 861
Roman Catholic Affiliated	264	100, 262
Other Religions Affiliated	17	2, 243

Plaintiffs' Exhibit 8

DETAILS CONFIDENTIAL

N. P. FARQUHAR
12-A WEST LANE
BLOOMFIELD, CONN. 06002

following are statistics for 61 Connecticut independent schools reporting to the tional Association of Independent Schools 59 are in CAIS All have open enrollment ices and all seek to employ minority-group members on faculties In these ures it will be seen that 58 schools had minority-group students enrolled in the of 1969 and 22 had minority-group teachers Percentages of minority group ients appear only when the percentage exceeded 5%

Total Enr.	Negro Enr.	Total Scholarships	$ Value	Minority Scholarships: Full	Part	$ Value	Minority Faculty	Cross % Minority Students	
100	3	2	6,000	2	0	6,000			
270	5	35	65,000	3	1	10,400			
105	8	11	8,500	0	0	xxxxx		7.6	
60	1	0	xxxx	0	0	xxxx			Students all under psychiatric treatment
110	4	13	25,330	0	4	8,600	✓		
140	8	26	21,800	6	2	9,600	✓	5.7	
316	19	29	13,500	0	14	9,000	✓	6.0	
200	2	4	5,360	2	0	1825			
90	1	4	3,400	0	1	900			
136	7	28	18,500	1	6	4,000		5.1	
580	21	102	206,750	12	8	59,500	✓		
401	3	10	10.545	3	1	3.940	✓		
312	20	5	14,000	5	0	14,000		6.4	
299	5	13	12,682	3	1	5,472			
360	14*	53	40.350	1*	16*	17,500			* Blacks only Other minorities reflected in scholarship figures
192	9	12	11,500	4	1	7,200	✓		
202	6	23	41.920	5	1	20,400			
165	0	0	xxxx	0	0	xxxx			
163	3	14	9.280	2	0	2,920			
388	16*	71	174,825	12*	5*	54,425			
180	24	37	66.000	26	5	55.000	✓	13.3	
227	4	17	34.200	2	2	8.000			

(2)

DETAILS CONFIDENTIAL

N. P. FARQUHAR
12-A WEST LANE
BLOOMFIELD, CONN. 06002

Total Enr.	Black Enr.	Total Scholar-ships	$ value	Minority Scholar-ships Full	Part	$ value	Minority Fac.	Over 6% minority	
154	5	12	8,710	2	0	2,380	✓		
443	21	49	44,000	Not reported			✓		
80	7	14	17,500	7	0	10,850	✓	8.8	
105	4	22	18,635	0	2	1,925	✓		
734	3	8	6,400	2	1	4,100			
350	4	9	9,000	3	0	4,500			
437	29	81	120,000	23	5	64,000	✓	6.6	
203	2	13	9,860	0	2	670			
240	14	32	35,480	8	7	20,000	✓	5.8	
398	19*	78	174,000	21*	1*	66,300	✓		* Black's only [illegible] other min groups [illegible]
193	2	14	7,000	0	0	xx xx			
204	4*	16	40,000	6*	0*	23,400			✓ " "
184	5	21	43,000	4	1	16,200			
368	12	36	38,700	1	9	15,800	✓		
250	5	11	36,600	5	0	21,500	✓		
162	17	51	104,475	9	6	45,850		10.5	
300	10	54	58,250	1	3	4,900	✓		
329	17	17	16,525	3	5	5,125			
457	15	32	21,109	7	6	9,490			
195	4*	19	44,445	5*	0	17,500			* " "
247	16	56	103,450	12	4	51,300		6.5	
140	9	20	25,000	7	2	16,000		6.4	
229	3	6	7,200	2	1	3,280			

CONFIDENTIAL

N. P. FARQUHAR
12-A WEST LANE
BLOOMFIELD, CONN. 06002

Total Enr	Black Enr	Total Scholarships	$ Value	Minority Scholarships Full	Part	$ Value	Minority Fac	Over 50% Min.	
317	2	29	18,400	Not reported					
250	5*	30	31,150	6*	0	8,600			* Blacks only in col 2. Other minority groups included in scholarship awards
44	2	20	9,850	0	1	2,000			
2[illegible]	20	114	191,975	9	9	48,600			
35	7	26	30,835	3	4	11,985	✓		
30	0	12	8,000	0	0	xxxx			
39	11	56	73,600	5	6	15,200			
25	8	27	69,100	5	2	24,500			
4	0	2	1,700	0	0	xxxx			
30	10*	26	47.830	7*	6*	31,630		6.7	Blacks only in col 2 note
35	12	11	14,012	11	0	14,012	✓		
11	9*	18	46,700	6*	5*	35,200	✓		" " " " "
5	1	25	15,000	1	0	1,500			
20	5	14	13,163	3	2	5,813	✓		
8	3	13	12,100	0	3	3,800			
2[illegible]	19	32	81,150	12	7	62,650		9.0	
43	523	1635	2,430,806	280	167	945,932**	22	14	** Some not reported

18 - These totals should be checked).

Plaintiffs' Exhibit 14

(Letterhead of Wiggin & Dana, 205 Church Street, New Haven, Connecticut 06508)

May 20, 1970

RE: *CCLU* v. *Sanders*

Mr. Peter L. Costas
Attorney-at-law
#111 Pearl Street
Hartford, Connecticut

Dear Peter:

Per request and in order to avoid taking of various depositions, I enclose herewith three (3) copies of the following instruments:

(1) *Connecticut Association of Independent Schools, 1969-70 Survey of Enrollments and Faculties.*

Checking subsequent to the preparation of this list, has indicated there are a few minor discrepancies, but I believe that this survey shows with substantial accuracy the total student body of the various schools which are members of the Association, together with the number of students in Connecticut and the faculty ratio.

(2) Instrument headed *"Details Confidential"*

This is a survey performed in Connecticut on behalf of the National Association of Independent Schools. It covers sixty-one (61) Connecticut Independent Schools, fifty-nine (59) of which are members of the Connecticut Association of Independent Schools. It excludes proprietary schools.

endowed academies, serving as local high schools and church-related schools who are not members of the National Association. The schools are listed by code letters. The list shows the total enrollment, the black or minority group enrollment, the total number of scholarships available at the school, the total value of all scholarships, the number of minority students receiving scholarships, the value of scholarships awarded to minority students and a list of the schools which have minority faculty members. You will note that of the total enrollment of independent schools, approximately 3% is black and that virtually all of these are on full or part time scholarships.

The N. P. Farquhar referred to on the face of this schedule, is the Executive Secretary of the Connecticut Association of Independent Schools.

Both instruments are taken from the files of the Connecticut Association of Independent Schools at 12-A West Lane, Bloomfield.

Very truly yours,

/s/ JOHN Q. TILSON
John Q. Tilson

JQT/rmm
Enclosures

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MAR 1 1971
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL.,

Appellants,

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Appellees.

Motion For Leave To File Brief Amicus Curiae and

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF LAYMEN

Leo J. Jordan, Esquire
1215 Townley Dr.
Bloomington, Illinois 61701

Attorney for National Association of Laymen

January 15, 1971

PANTAGRAPH CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL.,

Appellants,

v.

DAVID H. KURTZMAN, ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF FOR NATIONAL ASSOCIATION OF LAYMEN AS AMICUS CURIAE

To: The Supreme Court of the United States

The National Association of Laymen respectfully moves for an order granting leave to file a brief amicus curiae in the above entitled case pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Consent of the attorney for the appellants as well as attorneys for appellees, Kurtzman and Sloan has been filed. Consent of the attorneys for appellee schools has been requested over [ninety] days ago and no notice of refusal of permission has been received.

1. The National Association of Laymen (NAL) was founded in 1957 and is composed of 29 affiliates and 12,000 members. NAL is incorporated under the Texas Non-profit

Corporation Act and is organized exclusively for religious and charitable purposes. This association is both independent in formation and operation and while its membership is composed principally of lay Catholic men and women, it remains unencumbered by either legal or ecclesiastical affiliation with the Catholic Church. This association was conceived from the implementing concepts of Vatican Council II and is dedicated to renewal of the Roman Catholic Church. NAL has spearheaded the movements to obtain greater lay involvement in the significant decisions concerning priorities for church action and the expenditure of human and financial resources. Of significant importance is that NAL has challenged the traditional Catholic approach to education.

It is our position that the interest of NAL in this litigation is unique and not represented by any of the parties. NAL represents the voice of the progressive Catholic laity striving for the establishment of educational priorities within the Catholic Church. Moreover, the decision of the Court in this case involves matters that affect far more people than the immediate record indicates, and is expected to have a grave effect upon our members and ideological supporters in the Commonwealth of Pennsylvania as well as a potentially serious impact upon progressive Catholics throughout the nation.

2. The involvement of NAL in this matter is necessary and vital so as to prevent the circumvention of the Constitution of the United States. The position of NAL is set out in two arguments, the former is concerned with the purpose and primary effect of Act 109 as it effects the establishment clause of the first amendment. The latter will involve the public welfare purpose of Act 109 as it affects the constitutional guarantee of religious freedom.

With respect to the establishment clause, NAL will advise the Court regarding a very real conflict which is precipitated by Act 109 as it is considered in its relationship with ecclesastical law which claims preeminence over the former. This brief will bring to the Court's attention the impossibility of performance of Act 109, this purchase of service contract, because of its direct conflict with ecclesiastical law. Moreover, NAL will

request this Court to consider the aggravating divisiveness encountered when government attempts to become excessively involved in religion thereby creating an educational interdependence between the state and religion.

The brief of NAL will also advise the Court regarding the adverse effects upon religious freedom which results from an effort of the Commonwealth of Pennsylvania to aid in perpetuating the existing Catholic school system against the interests and wishes of a considerable segment of members of the Catholic church. NAL will bring to the attention of the Court the apparent absence of a compelling reason for this public welfare legislation because of the existence of palliative alternatives, including use of existing church funds.

3. NAL will advise the Court of unique information within the knowledge of this association. This brief will point out matters of pertinent information relating to church government and laws, customs, ideologies, educational philosophies, as well as information relating to financial consideration. Because of the special knowledge of Catholic church matters, NAL urges that it can provide the Court with relevant and meaningful information necessary to a proper and complete judgment of this case.

For the foregoing reasons, NAL through its attorney, respectfully prays that he be accorded leave to file a brief amicus curiae in order to present arguments and viewpoints on the matters involved in the case, which the parties themselves may not present.

Dated January 15, 1971

Leo J. Jordan, Esquire
1215 Townley Dr.
Bloomington, Illinois 61701

Attorney for National
Association of Laymen

SUMMARY OF ARGUMENT

I

It appears virtually certain that the primary purpose and

principal effect of The Pennsylvania Elementary and Secondary Education Act (Act 109 of 1968) is to offer significant direct financial aid to Catholic parochial schools. Such enactment provides only an extrinsic and indirect benefit to the welfare of the public. It is incongruous not to accept this inescapable conclusion because the pattern of state aid to nonpublic school legislative efforts can be traced directly to the hierarchy of the Roman Catholic church operating through the United States Catholic Conference. The background and legislative history of Vatican II documents vividly sustains this premise.

If the primary purpose of Act 109 is to offer direct financial aid to private schools operating under the control of religious bodies, then we must determine whether this act either on its face or in its primary effect advances or inhibits religion. Our research has convinced us that Canon Law, supported by the teaching body of the Church (the hierarchy), unmistakably requires that the imparting of religious and moral principles must permeate the entire curriculum of the Catholic school. The Declaration on Christian Education, a promulgation of Vatican II, refutes the concepts of a separatist approach to Catholic education, a concept necessary to the validity of Act 109.

Pennsylvania Act 109 limits the implementation of the law solely to defined "secular subjects." The term is defined to "mean any course which is presented in . . . public schools . . . and shall not include any subject matter expressing religious teaching, or the morals . . . of any sect." If the laws of the Catholic church require a permeated curriculum and prohibit a separatist educational system, and the law of the Commonwealth can aid only a separatist system, the purpose and primary effect of Act 109 is frustrated. We submit that this apparent dichotomy can be resolved only after an evidentiary hearing on the merits of the case.

The Court, in *Abington Township v. Schempp* 374 U.S. 203 (1963) expressed the doctrine that one of the most important determinations of governmental-religious associations is whether the enacted law will give rise to "divisive influences and inhibitions of freedom which both religion clauses of the

First Amendment preclude." Experience in Illinois and in other jurisdictions wherein state-aid provisions were considered manifests a divisive and harmful situation when such aid is under legislative consideration. Mr. Justice Harlan, in *Board of Education v. Allen*, 392 U.S. 236 (1968) forewarned us of the dangers involved when the state becomes so significantly involved in religious matters. We urge the Court to consider the very real possibility that permanent wounds might well result from this continued activity.

II

The Pennsylvania Elementary and Secondary Education Act (Act 109 of 1968) is a law which prohibits the free exercise of religion. Appellees brief (at 54) expresses that this Act does not, "place any restriction upon anyone's religion." The National Association of Laymen is composed of many thousands of Catholic laity who are decidedly committed to the renewal of the Catholic church. Moreover, many thousands of Catholic citizens who are not members of this association share in its goal for church renewal. A fundamental belief of these progressive Catholics is that the Catholic educational system must be used to pursue the goal of renewal: to bring salvation to all men.

NAL, and its ideological supporters, are demanding that the church establish priorities for the use of church educational resources. The present, parochial school system which uses a substantial amount of those resources for the *general* and *religious* education of but a small percentage of total church population, to the exclusion of a religious education of all, manifests, in our judgment, a misdirection of priorities.

The alleged public welfare purpose of Act 109 infringes upon the free exercise right of thousands of Catholics. Moreover, no compelling reason justifies the substantial infringement upon the free exercise rights of progressive minded Catholics. The Court has held that it would not tolerate governmental interference nor excessive entanglement with religion, *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). The Commonwealth of Pennsylvania has indeed

interfered with the religious beliefs of progressive minded Catholics who are seeking renewal of their church through the enactment of Act 109. The Commonwealth should not be permitted to legislate measures designed to perpetuate the parochial school system in order to reduce its overall educational funding responsibilities; particularly so, if such enactment violates the religious freedom of a large number of American citizens.

If the Commonwealth finds that the public welfare must be served by providing direct financial aid to Catholic schools, it must further establish that no other measures are available to accomplish its purpose. The Commonwealth has not established that any other means, other than direct financial aid, have been attempted in an effort to meet its "public welfare" obligation. Finally, in establishing a compelling need, the Commonwealth has not determined whether church funds are available to provide for the "secular" education of Catholic school students in parochial schools.

ARGUMENT

I

THE COURT BELOW ERRED IN DECLARING THAT PENNSYLVANIA ACT 109 DOES NOT ON ITS FACE OR PRIMARY EFFECT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT WITHOUT BENEFIT OF DISCOVERY, EVIDENCE OR TRIAL.

Upon the basis of current Catholic Church laws, theology and customs, it appears certain that the primary purpose as well as the principal effect of Act 109 is to offer significant aid to Catholic, parochial schools, and thus violates the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment. *Abington School District v. Schempp*, 374 U.S. 203 (1963).

The question of law presented in the lower court is whether the purpose or the primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion. *Lemon v. Kurtzman*, 310 F. Supp. 35, 43.

There appears to be little question but that Lemon is but the next step in a pattern following *Board of Education v. Allen* 392 U.S. 236 (1968) in an attempt to obtain direct, substantial aid to parochial schools. In *Allen*, the Court reexamined its earlier decisions and expressed that the test of constitutionality first adopted in *Abington School District v. Schempp*, 374 U.S. 203 (1963), would be the appropriate test to determine the validity of legislation designed to achieve a public purpose through religiously affiliated institutions. 392 U.S. 236, 243.

> That test is stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment clause there must be a secular legislative purpose and a primary effect that neither advances or inhibits religion." *Schempp*, supra at 222. See also *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

It appears incongruous to accept the majority determination that the purpose and effect of Act 109 as manifested in 24 P.S.§5602 forecloses further investigation and discussion. We find it ponderously difficult to escape the immediate conclusion that the primary purpose of the act is to offer financial aid to sectarian Catholic schools. Whatever furtherance of the public welfare is involved, can only be termed as parenthetical and extrinsic. If evidence were offered, it would tend to establish that the introduction of legislation to obtain aid to Catholic schools in the various state legislatures has been precipitated, in large measure, by the actions of the American bishops operating through the United States Catholic Conference. The virtual impossibility of obtaining information regarding covert church activities renders it difficult to trace the origination of this movement in the United States; nevertheless, we cannot validly ignore its existence.

The Declaration on Christian Education of Vatican Council II, proclaimed by Pope Paul VI, on October 28, 1965, is the most recent official Church word on this subject. A Commen-

tary by Rt. Rev. Mark J. Hurley, a council expert serving the Commission on Education, (bearing the Imprimatur of Joseph T. McGucken, S.T.D. Archbishop of San Francisco), provides meaningful legislative history surrounding the promulgation of this document.[1] Cardinal Patrick A. O'Boyle, Archbishop of Washington, in a Foreword to this Commentary notes that Rev. Hurley was active in the deliberations of the Commission and its works. Cardinal O'Boyle reports, "He (Hurley) writes from the 'inside' authoritatively." [2]

In his Commentary, Rev. Hurley expresses the intent of the American bishops to have the document on education reflect their intense interest in financial aid.[3]

> The American members on the Conciliar Commission on Education were Archbishop Patrick O'Boyle of Washington, D.C., Archbishop [now Cardinal] John Cody of Chicago . . . and [former] Bishop Loras Lane of Rockford, Illinois. Their voices were heard to express the American point of view chiefly in three major areas:
>
> 1. The Council must make a statement that will be the basis for a coherent philosophy of Catholic education, one that will help to clarify church-state relationships in the field. Freedom of choice by parents to select the schools they want for their children; moral and financial assistance to parents on a non-discriminatory basis; a repudiation of monopoly in education by the state—these were details to be worked out by the Council.
>
> 2. The Catholic Church must promote both the Catholic schools as such and the other forms of education of those not in Catholic schools.
>
> 3. The Commission must make every effort to present a document at once consonant with papal teaching, especially that of Piux XI "On the Christian Education of Youth of 1929", and also to update that document and

[1] Hurley, M. *Commentary on Declaration on Christian Education of Vatican Council II*, Paulist Press, (1966).

[2] Supra, at 9.

[3] Supra, Note 1 at 22, 23.

make some significant advance beyond it with sound theory.

Following this listing of objectives quoted above, Rev. Hurley added, "Thus the American problematic was chiefly practical, but yet not entirely so. Practical conclusions needed to be drawn from sound theoretical bases, particularly if tests of constitutionality were to hold up in court." [4]

The influencing force of the American bishops upon the Vatican Council was manifested by formal Interventions designed to act as an influencing force upon the final document. The intervening statement of Cardinal Spellman illustrates the bishops' intent.[5]

> Parents should be free to choose the schools they wish for their children. They should not in consequence of their choice be subject to unjust economic burdens which would infringe upon this freedom of choice. Since it is the function of the state to facilitate civil freedom, justice and equity demand that a due measure of public aid be available to parents in support of the schools they select for their children.

Cardinal Spellman [at that time the unquestioned leader of the Church in America] continued with a clear reference to the United States: "Moreover, if these schools serve the public purpose of popular education, *the fact that they may be religious in their orientation should not exclude them from a rightful measure of public support.*" (Emphasis ours)

It is difficult to escape the conclusion that the genesis of the current drive to obtain state-aid to Catholic schools arose during the deliberations of Vatican II. It also appears certain that the overwhelming interest of the American bishops was to obtain governmental assistance to further the aims of Catholic educational goals. The forum under which this effort would be directed as provided by Rev. Hurley: ". . . [E]ach national conference of bishops . . . should be empowered by the Coun-

[4] Ibid., at 23.

[5] Supra, Note 1, at 152.

cil to make specific application of the schema on education to their own countries and specific conditions." [6]

The movement in the past several years to seek financial aid from the various state legislatures appears as a direct manifestation of the hierarchical plan of action commenced during Vatican II. Further evidence of application of this movement is expressed in the following summary: [7]

> Although they met with several setbacks, Roman Catholics this year gained favorable action in nearly a dozen states in their drive for direct public aid to parochial schools . . . A recent survey by the *U.S. Catholic Conference* showed these other gains by the church drive.... (Emphasis ours)

Based upon the available evidence, outlined above, we cannot escape the conclusion that the introduction of legislative history and relevant testimony would adequately support the conclusion that the primary purpose and effect of this act is to supply financial need to Catholic schools. Understandably, legislative findings are not lightly set aside; nevertheless, the overriding effect of the carefully drawn plans of the American hierarchy cannot be justly disregarded.

If indeed it is established by a supportive record that the primary purpose and effect of Act 109 is to offer financial aid to parochial schools, we must now determine whether evidence is available to establish whether or not such aid meets the test set out more recently in *Allen*: Does Act 109 either on its face or in its primary effect advance or inhibit religion?

Based upon knowledge of Catholic Church policies and customs, NAL can accept the holding of *Everson v. Board of Education*, 330 U.S. 1 (1947), that the public welfare is adequately satisfied by legislating measures to protect parochial school children to and from school wherein religious instruction is provided. But, in addition to the public interest, it appears as if little benefit inures to the religious institution. From our knowledge, parochial schools seldom provide transportation to their

[6] Supra, Note 1, at 24.

[7] Bay City Times, Aug. 25, 1970.

pupils. Parents are left to their own devices and would be expected to furnish their own means of conveyance. The primary beneficiary is the child, not the school.

On the other hand, *Board of Education v. Allen*, 392 U.S. 236 (1968), in providing for the loan of textbooks without charge gives us more difficulty interpreting the rationale. We must first of all understand that *Allen* was decided upon the basis of a "meager record" (392 U.S. 236, 248); and this is unfortunate. A full evidentiary hearing might well have produced a different result. Nevertheless, from our knowledge, evidence is available to establish that the rule and customs inherent in New York parochial schools would follow that of other areas. Traditionally, in Catholic schools, textbooks, as well as transportation, remain the responsibility of the parents. The practice of lending books to students provides little, if any, financial aid to sectarian schools. Again, the principal benefit of the New York statute inures to the child, not the school; therefore the result of *Allen* is not strikingly dissimilar to *Everson*.

We recognize that the public welfare or public interest holdings of *Everson* and *Allen*, were predicated upon the doctrine that the Constitution does not prevent a state from offering assistance to religious institutions simply because some direct aid inures to the institution. But these cases in support of that doctrine do not extend as far as paying funds into the Treasury of religious institutions simply because it is of a benefit of the state to do so. *Lemon v. Kurtzman*, 310 F. Supp. at 50.

The legislative purposes of Act 109 as expressed in 24 P.S. §5602 intimates that there exists upon the Commonwealth an obligation to prevent the closing of all non-public schools, because of the increased costs which would result upon the public school system. NAL submits that the appellants should be entitled to offer proof supporting the conclusion that the State is under no obligation, and has no authority, to insist upon the perpetuation of all Catholic and other sectarian schools. Evidence is available to explain the closing of a number of these schools. The Court should be aware of some of these reasons: (1) the lack of academic excellence; (2) lack of interest upon

the part of the parents; (3) the desire of many parents to have their children educated within the mainstream of American life; and (4) financial considerations.[8] NAL is convinced that evidence should be heard for the purpose of determining whether the state, in pursuit of its proximate desire to reduce educational costs, should provide assistance payments to religiously oriented schools.

NAL urges that it is a mistake to conclude that the primary effect of Act 109 is limited to secular instruction and that it benefits religious institutions only in an incidental manner. Even when viewed within the narrow limits of the legislative findings and the face of the statute itself, an immediate conflict results which appears to frustrate the basic purpose of the statute.

The majority below held, as did *Allen*, that the "States interest in education would be served sufficiently by reliance upon the secular teachings that accompany religious training in non-public schools. 310 F. Supp. at 46. The majority also expressed what we submit is an erroneous conclusion: "... [R]eligious schools pursue two goals, religious instruction and secular education," citing *Allen*, 392 U.S. at 245, 310 F. Supp. at 46.

The conclusions reached both in *Allen* and *Lemon* that religious schools pursue two goals, secular and religious, is directly contradictory to Catholic Church teachings. The goal of Christian education is expressly set out in the Declaration of Christian Education as follows: [9]

> A Christian education . . . has as its principal purpose this goal: that the baptized . . . become ever more aware of the gift of faith they have received, and that they learn in addition how to worship God the Father in spirit and trust . . . , and be conformed in their personal lives according to the new man created in justice and holiness of truth . . . ; also that they develop into perfect manhood, to the mature measure of the fullness of Christ . . . Moreover, that aware of their calling, they

[8] McCluskey, *Catholic Education Faces Its Future*, (1968) at 120.

[9] Paul VI, *Declaration on Christian Education*, St. Paul Edition, (1965) at 7.

> learn not only how to bear witness to the hope that is in them but also to help in the Christian formation of the world . . . Wherefore this sacred synod recalls to pastors of souls their most serious obligation to see to it that all the faithful, but especially the youth who are the hope of the Church, enjoy this Christian education.

The "two goal" end of Christian education as expressed in *Allen* and *Lemon* can be explained, at least in part, by the "meager record" (*Allen*) 392 U.S. at 248, as well as the "no record" in *Lemon*. This is why NAL feels so strongly regarding the need of an adequate record. Based upon our knowledge of Catholic Church teachings, the best that can be stated is, while the goal of Christian education can only be expressed as the formation of Christian beliefs and attitudes, the means to inculcate their attitudes must indeed include secular concepts. This is no less true in schools committed to forming Christians. The schools must use all of their functions to develop these attitudes.

Let us now set out some of the traditional concepts of Christian education, which, if established in an evidentiary manner, would tend to sustain the conclusion of but a single goal.

That the basic purpose and proximate end of parochial schools is religious orientation cannot be denied. The laws of the Church support that view and claim to have greater dominance than civil law. If the law of the Church is considered preeminent to civil law, and such ecclesiastical law contravenes the expressed concepts of the civil law, can we deny that the purpose and primary effect of Act 109 is, at the very least, subjectively frustrated in its relationship with Catholic parochial schools?

Modern day Catholic Church teachings on Christian education can be traced to the encyclical of Pope Pius XI, Christian Education of Youth, (Dec. 1, 1929). In this encyclical Pius XI treats of education in its broadest conceptual extent: both natural and supernatural, physical and spiritual, moral and intellectual, and as carried on by the family, the state, and the

church. The concept expressed by Pius XI is that man beginning with all natural talents and capacities gradually evolves to a higher, divine life (heaven). The model for this life, of course, is Christ. This concept represents the totality of Christian education, and the goal to be attained in the education of a Christian.

The manifestation of Church law as promulgated by Pius XI is summed up in several places in this renowned encyclical.[10]

> It must never be forgotten that the subject of Christian education is man whole and entire, soul united to body in unity of nature, with all his faculties natural and supernatural, such as right reason and revelation show him to be; man, therefore, fallen from his original estate, but redeemed by Christ and restored to the supernatural condition of adopted son of God. . . .[11]
>
> The proper and immediate end of Christian education is to cooperate with divine grace in forming the true and perfect Christian, that is, to form Christ himself in those regenerated by Baptism. . . .[12]
>
> . . . Christian education takes in the whole aggregate of human life, physical and spiritual, intellectual and moral, individual, domestic and social, not with a view of reducing it in any way, but in order to elevate, regulate and perfect it, in accordance with the example and teaching of Christ.
>
> Hence the true Christian, product of Christian education, is the supernatural man who thinks, judges and acts constantly and consistently in accordance with right reason illumined by the supernatural light of the example and teaching of Christ.[13]

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[10] Pius XI, Encyclical letter, *Christian Education of Youth*, (1929) English translation is from the National Catholic Welfare Conference edition (Wash. D.C., 1936), unless otherwise noted.

[11] Ibid., at 23.

[12] Ibid., at 35.

[13] Ibid., at 36.

Pius XI remains unequivocal in asserting the full authority of the Church to regulate every aspect of education. The preeminence of the Church in matters of education is expressed in the following passages from the encyclical:

> . . . (The Church) has the express mission and supreme authority given her by her divine founder: "All power is given to me in heaven and on earth. Going therefore teach ye all nations . . ." [14]
>
> The Church is independent of any sort of earthly power as well in the origin as in the exercise of her mission as educator . . . With regard to every other kind of human learning and instruction . . . the church has an independent right to make use of it, and above all to decide what may help or harm Christian education. . . .[15]
>
> . . . It is necessary that all of the teachings and the whole organization of the school, and its teachers, syllabus and textbooks in every branch, be regulated by the Christian spirit, under the direction and maternal supervision of the church; so that Religion may be in very truth the foundation and crown of the youth's entire training; and this in every grade of school, not only the elementary, but the intermediate and the higher institutions of learning as well.[16]

The transcending authority of the church over the state in matters of education is abundantly set out in the encyclical above. But we must move on and determine whether the traditional position of the Church has undergone serious revision. It appears certain that the promulgation of this encyclical outlining the preeminence of the Church in matters of education, and the adoption of a religiously and morally permeated curriculum, has lost none of its fervor.

As recently as 1960, Pope John XXIII in a letter to the International Office of Catholic Education, Utrecht, Netherlands wrote: "Catholic educators will know how to adopt to new

[14] Ibid., at 14

[15] Ibid., at 8.

[16] Ibid., at 30.

situations the ever new principles of Pius XI admirable Encyclical on the Church's teaching authority. This capital document has lost none of its truth." [17]

The Declaration on Christian Education [18] promulgated by the bishops during Vatican II is awakening Catholic educational philosophies. Nevertheless, a careful reading of this instruction reflects a continuing endorsement of the concepts expressed in the encyclical by Piux XI. It cannot be denied that the Church has an urgent responsibility for the totality of the Christian life. We cannot disparage this responsibility; nor can we accept the concept that Catholic education runs along parallel traces of secular and religious orientation. The recent declaration refutes the concept of a separatist approach to Catholic education. This intent is expressed in the following relevant passages:

> To fulfill the mandate she has received from her divine founder . . . the church must be concerned with the whole of man's life, even the secular part of it insofar as it has a bearing on his heavenly calling.[19]
>
> Therefore, children and young people must be helped, with the aid of the latest advances in psychology and the arts and science of teaching, to develop harmoniously their physical, moral, and intellectual endowments. . . .[20]
>
> Parents who have the primary responsibility and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools, consequently, the government . . . must see to it . . . that *public assistance is given*. . . .[21] (Emphasis ours)
>
> The church reminds parents of the duty that is theirs to arrange and even demand that their children be able to

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[17] Conway, *Principles of Education*, at 2n (1960) citing The Register, National Edition, January 10, 1960.

[18] Paul VI, *Declaration on Christian Education*, St. Paul Edition, (1965).

[19] Ibid., at 5, 6.

[20] Ibid., at 6, sec. 1.

[21] Ibid., at 10, sec. 6.

> enjoy these aids and advance in their Christian formation to a degree that is abreast of their development in secular subjects. Therefore the church *esteems highly those civil authorities* and societies which, bearing in mind the pluralism of contemporary society and respecting religious freedom, *assist families so that the education of their children* can be imparted in all schools according to the individual moral and religious principles of the families.[22] (Emphasis ours)

The concept ever present in church educational discipline is that the Christian spirit must permeate the entire curriculum. The concept of permeation as an integrated Catholic unit is almost universally endorsed by Catholic leaders and educators. The importance of an integrated Catholic educational system is pointed out by Dr. Roy J. Deferrari of the Catholic University of America in his work entitled "A Complete System of Catholic Education Is Necessary." In this book (bearing the Imprimatur of Cardinal Patrick A. O'Boyle, D.D., Archbishop of Washington), the author expresses the following:

> In the implementation of Catholic education, the all-important problem is obtaining enough properly trained teachers. This involves much more than appears evident at first sight. The teachers must be able to teach their subjects in a manner that will place them in their proper perspective with all the other subjects of the curriculum. They must be able to integrate as they teach.[23]
>
> Most of us would be willing to assert that . . . , integration with life is necessary for good teaching in any field. But it is at this point that the secular and the Catholic educator come to the parting of the ways.[24]
>
> He [the teacher] must seek integration through theology, under whatever name theology may raise her head in a Catholic school or college. In other words, the Catholic teacher must seek integration with the life of the next

[22] Ibid., at 11, sec. 7.

[23] Deferrari, *A Complete System of Catholic Education Is Necessary*, (1964) at 19.

[24] Ibid., at 20.

> world as well as with life in the present, since the two are integrally related, and are essentially one.[25]
>
> To implement successfully the Catholic concept of integration more is needed than the mere introduction . . . of courses in theology and religion, philosophy and church history, . . . The ultimate objectives of these courses and the ultimate objectives of the total program must penetrate every teaching field of the school or college.[26]
>
> Some administrators . . . think nothing of hiring non-Catholics as teachers . . . How they can expect to carry on a program of integrated studies with such a policy as this is difficult to understand.[27]

Even the popular, late Archbishop of Boston expresses himself forcefully upon the permeation concept. In his book entitled "The Mission of the Teacher", Richard Cardinal Cushing expresses his concepts of a Catholic education system:

> We must prove to them [students] that they are indebted to the church . . . We must make it clear, not merely in our philosophy classes, but in all branches of learning, that permeating all our formal education . . ., there is a philosophy . . . which is unique and indispensable. . . .[28]

He continues

> The embodiment of the Catholic "manner" should be Jesus Christ, and His personality should dominate all our schools. If it does, then He will be the principle difference between our schools and all others. . . .[29]

Finally the late Cardinal relates in a paper entitled "Education—A Supernatural Work."

> We are in line with the best educational traditions when we make religion the integrating subject to which all

[25] Ibid., at 21.

[26] Ibid., at 23, 24.

[27] Ibid., at 30, 31.

[28] Cushing, *The Mission of the Teacher,* (1962) at 17.

[29] Ibid., at 25.

> other subjects are related. In its relationship to the school's curriculum, it should be the strongest, the pivotal department. See to it, therefore, my dear teachers, that you keep religion in the atmosphere of the school and in the teaching of every class.[30]

NAL submits that the underlying premise of *Allen* that non-public schools, even if religiously oriented, perform a secular purpose distinctly severed from religious teaching fails when placed against the overt concepts of Christian education. The permeation and integration philosophy cannot be ignored. It is fundamental to a sound Christian education. We respectfully urge the Court not to repeat the error in *Allen* and make a judgment without full consideration of available evidence.

The similarity between the statute in *Allen* and Act 109 apparently caused the lower court to conclude that discovery and testimony were unnecessary to a determination of the establishment issue. We are not convinced that intrinsic similarities exist. The New York statute does not expressly limit the definition of "textbooks" to secular subjects, New York Education Law § 701 (1967 Supp.). This conclusion was judicially determined by the Court of Appeals of New York. *Board of Education v. Allen*, 20 N.Y. 2d 109, 228 NE 2d 791, (1967).

But the Pennsylvania Act expressly, on its face, limits the implementation of this program to secular subjects. This term is defined in §5603 as follows:

> "(3) 'Secular subject' shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing *religious teachings*, or the *morals* or forms of worship of any sect." (Emphasis ours)

The relevant terms expressed in the statute are "religious teachings or the morals . . . of any sect." It appears manifestly certain that if ecclesiastical law *prohibits* the exclusion of the religious teaching or knowledge of proper morality in "secular subjects" and Act 109 *requires* the exclusion, the former law must give way in order for Act 109 to become effectual. The law

[30] Ibid., at 149.

of the Church on this matter is unchanged; therefore the purpose of Act 109 is subjectively frustrated. Some will argue that the relevant laws of the Church, while not expressly repealed, have gradually eroded and, in some instances, are virtually meaningless. It appears that such an argument is without foundation. This is evident from the following statement:

> The church is conservative in her legislation. Changes in the universal laws of the church are made solely by the Holy See, and only for serious reasons and after mature deliberations. . . . In the case of doubt whether the former law has been revoked, the repeal of the law is not to be presumed, . . .[31]

We have shown through the Declaration on Christian Education, supra, that the permeated curriculum is as relevant today in the area of religious teaching *and morals* as ever. No tenet of ecclesiastical law has, either in part or in toto, abrogated this rule. Unless appellees offer evidence to rebut the proximate effect of ecclesiastical law, the purpose and primary effect of Act 109 is frustrated and rendered ineffectual, *per se*.

Chief Circuit Judge Hastie in his dissenting opinion in *Lemon* expressed the concern that Act 109, . . . "much more than *Everson* and *Allen* invites religious groups and organizations to act politically and involved the state intrusively in the affairs of religious institutions." *Lemon v. Kurtzman*, 310 F. Supp. at 51. Up to this point, the community divisiveness and antagonism over matters of religion, as expressed by Judge Hastie, have not been of a significant import. However, the introduction of financial aid to parochial school legislation in a large number of states has created what some consider permanent wounds. For example, legislation, virtually identical to Act 109, was considered by the Illinois legislature during 1970 and an NAL representative was privileged to testify at the request of the legislature. Feelings ran high during this session over the issue of state aid. Consider the comments of Martin J. Lowery, Chicago Diocese school board chair-

[31] Woywood & Smith, *A Practical Commentary on the Code of Canon Law*, at 14, 15, New and Revised edition (1952) citing Canon 23.

man, as reported in the Chicago Tribune on May 17, 1970. "If the State Senate does not approve state-aid before the closing of this session, this board will initiate plans for the curtailment of the Catholic school program in every elementary school." Dr. Lowery is also quoted, in the May 17 edition of the Chicago Sun-Times, in pursuit of this threat to close Catholic schools if aid was not provided, as follows: "Sure this is a political move, and we expect a political response."

Consider please, the comments of Illinois State Senator Harris W. Fawell as he discusses the rising tensions which occurred during the legislative period of the Illinois bill; whose comments were reportedly precipitated by a dramatic and well-timed visit to the Illinois Legislature by Cardinal John Cody and an estimated 50 busloads of parochial school children. Fawell expressed: [32]

> If there was ever an outstanding example of the wisdom of our Founding Fathers' insistence on a constitutional separation of church and state, the pressure campaign being mounted to pass this legislation is it.
>
> When you combine the power of Chicago's mayor, a Democrat, the power of the governor of Illinois, a Republican, and the power of the Cardinal of the Chicago archdiocese, then reason is trampled, the state constitution is purposely blatantly subverted and most of the press and the General Assembly is stampeded.

Charles Nicodemus, Chicago Daily News columnist, in attesting to the pressure added,

> "Whether he's [Fawell] right or wrong . . . rarely, if ever, in Illinois history has the Legislature been subjected to a higher pressure lobby." [33]

Evidence available since the enactment of Act 109 clearly points out the dangers of governmental intrusion into the realm of church related activities. One of the most important elements to be considered by the Court is a determination, based upon

[32] Chicago Daily News, (5-23-70) Column by Charles Nicodemus.
[33] Ibid.

full disclosure, whether this act or similar proposals will give rise to "divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude." *Abington Township v. Schempp,* (1963) 374 U.S. 203, 307.

The community divisiveness created by the introduction of state-aid bills is to be abhorred. While the initial aim of church authorities apparently is to obtain limited aid while establishing the constitutionality of such aid; nevertheless, evidence is abundantly available to establish that the church will be satisfied with nothing less than parity.

During the recent elections, tax support for non-public schools was directly voted upon in two states, Michigan and Nebraska. In Michigan, a constitutional amendment prohibiting such support carried. In Nebraska, an amendment modifying a constitutional ban on such support was defeated. Thus the majorities in both states upheld the principle, written into the constitution of many states, including Illinois, that tax money should not be appropriated to the support of private schools.

We can only conclude here, upon the basis of available evidence and personal experience, that evidentiary matter would sustain the premise that similar legislation, "[I]nvites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions." *Lemon v. Kurtzman* (310 F. Supp. at 51)

NAL respectfully urges that the record before the court is meager and insufficient to term Act 109 constitutional. The act on its face and in its primary effect clearly conflicts with Catholic church law. Moreover, it appears certain that in this instant statute, at least as to primary effect, the Commonwealth has transcended the allowable position of neutrality. While it is not precisely determined whether the principle of neutrality runs to establishment or free exercise, our readings cause us to admit its relevancy to both. *Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970). It is our conclusion that the divisive effect of state aid legislative efforts and enactments is detrimental to neutrality concepts expressed by this Court. NAL respectfully submits that no decision upon this crucial issue should be made without an adequate record. The case

should properly be remanded to the District Court for an evidentiary hearing on the merits of this case.

ARGUMENT II

PENNSYLVANIA ACT 109 ABRIDGES THE RIGHT TO FREE EXERCISE OF RELIGION SECURED UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT THROUGH THE FOURTEENTH AMENDMENT.

The majority in *Lemon* found that the purpose of Act 109 was, as expressed in the statute, "to promote the welfare of the people of the Commonwealth of Pennsylvania" and "to promote the secular education of children of the Commonwealth of Pennsylvania" attending non-public schools." 310 F. Supp. at 45. While our argument I (above) refutes this conclusion, we must understand the implications of these legislative findings in its relationship to the free exercise clause.

The National Association of Laymen, (NAL), while not a direct party to the litigation, nevertheless, within the framework of an Amicus, is compelled to bring to the attention of the Court the crucial importance of this issue upon the religious beliefs and practices of members of this association as well as those who share its beliefs and ideologies. In the position of Amicus, NAL will establish "the coercive effect of the enactment as it operates against them [us] in the practice of their [our] religion" *Abington School District v. Schempp*, 374 U.S. 203, at 223 (1963).

The National Association of Laymen was established in 1967 and it origin was founded upon precepts having their genesis in Vatican II. This association is composed of thousands of Catholic men and women who have joined together in a mutuality of beliefs. Moreover, the basic beliefs of its members are based solidly upon the doctrine of Catholic church renewal, leading toward a mature Catholic, Christian religion. The basic ideologies of this association are shared by many thousands of American lay Catholics. The intrusion of the Commonwealth of Pennsylvania into Catholic religious affairs has created a

sense of anxiety and apprehension among virtually the entire membership of this association, many of whom are citizens and residents of Pennsylvania, as well as among other Catholics who share and espouse the beliefs we witness.

When Pope John XXIII summoned the bishops to Rome at the commencement of the Vatican Council II in the early 1960's, many American Catholics viewed this call as an encouraging sign that renewal in the Catholic Church had begun. The Council was looked upon as an opportunity for the laity to assert their rightful place in the church. A significant number of renewal minded Catholics were yearning for something from the Church which would enrich their lives and give them a vision and faith by which they can live and which they can draw on in the task of raising their families.

In setting out the mission and purpose of renewal the noted Catholic author Eugene C. Kennedy wrote:

> As the people of God we have a covenant with each other to pursue the same goals and to share our faith and love with all mankind. It is such understanding of our corporate mission that must motivate us to renew the institutional forms of the church. The question centers on institutional integrity. Do the institutions of the church contribute to its carrying out of service as effectively as possible? Those which do not must be repatterned so that they may become a true instrumentation of service.[34]

NAL members and ideological supporters are members of the Catholic Church. Many are products of Catholic education throughout. While faithful members of the Church and vitally concerned with its welfare, we are nevertheless imbued with the spirit of renewal permeated since Vatican II. The basic ideologies of NAL can be found in this summary of the preamble to its constitution:

> NAL is a group of Christian believers who are concerned to create within the Church a system of religion (i.e., beliefs, morality, religious practices, education) that is

[34] Kennedy, *The People Are the Church* (1969) at 12.

> not fatalistic and magical (as it is today) so that the basic trust of Judaism and Christianity is reinjected back into our church and the religious life of man. A religious life that lets man see himself responsible for himself and his world; entering into religious activities that express the intrinsic constant presence of God and man's awareness of this God. This involves a dramatic departure from a religion being passive, dependent, and childish to being active, independent, and free.

Our efforts at renewal are dedicated to a new religion which must have beliefs, morality, customs and behavior that encourages man to think for himself (not done by clergy), to decide for himself (not just being obedient), to create worship for himself (not just to follow canned rituals), to search continually for truth, to be open and respectful of a person's conscience (not to socially coerce a set conscience); to see Christ as the center of their lives, to allow men to gather with others of similar faith to worship and to pursue the above purposes.

The Catholic education system is the only manner in which the beliefs of NAL and its ideological supporters may be properly inculcated and our efforts at Church renewal accomplished. But NAL is convinced that the current overriding emphasis upon the parochial parish school is hindering the implementation of our beliefs. Our commitment to the mission of the church can be summed up in the words of Rev. Kennedy:

> The demands of the age are on those people who are charged with leading it to the freedom of the sons of God, not to bringing its people back into submission. It is their problem to see that the moral educational practice of the church is appropriately informed and mature.[35]

The traditional concepts of Catholic education has centered almost exclusively upon the parochial school system. The concept was, and remains, essentially child-centered. Although it reaches only a portion of the Catholic school and college

[35] Ibid., at 61

population, the system involves a large proportion of the church's available manpower, resources, and zeal.

> Historically, the bishop and clergy have taken the lead in maintaining parochial and diocesan schools . . . according to Canon law the bishop alone has the authority to establish parochial or diocesan schools . . . The totally subordinate relationship of the laymen in religious affairs, as well as the central position of the bishop in civil and Canon laws, have unfortunately resulted in an underemphasis on the role of the layman and laywoman —parents—in school matters.[36]

NAL firmly believes that the mission of the church can only be satisfied by providing each member of this church, adult and child alike, with the means to obtain total religious formation. The mission of the church is not limited to the child in the parish school. This mission extends to the Catholic child in the public school, the young adults both on off college campuses, and the adult Catholic, including the aged. Our priorities are misdirected if we insist upon providing a *general* education for only those children in Catholic schools if this concept prohibits or makes manifestly more difficult *religious* education to the remainder. We, in NAL, are committed to the concept that there must be a more complete vision of Catholic education.

In a recent publication discussing the changing patterns of Catholic education, the authors pointed out, "the shameful record of the American Catholic Church in meeting the religious educational needs of children who are not attending Catholic schools." Citing several studies to support this conclusion, the authors pointed out: [37]

> A recent . . . study by the National Office of the Confraternity of Christian Doctrine [CCD] discovered that parish CCD units are largely ineffective because they are crippled by . . . lack of direction and support on the part of the pastor and lack of financial support.

[36] McCluskey, *Catholic Education Faces Its Future*, (1968), at 114.

[37] Reedy-Andrews, *The Perplexed Catholic* (1967) at 67.

> In 1964, a national survey of 40% of U.S. dioceses showed that only five percent of funds available for religious education was used for education of students not attending Catholic schools, which is at least 50 percent of Catholic youth.

It is the corporate judgment of NAL that the present *system* of Catholic education, with the overriding emphasis upon parochial schools, is a dismal failure. If the parochial school absorbs the largest part of parish revenue, in some instances taking as much as 75%,[38] the religious formation of others is grossly neglected. "Can we afford, when the need for the religious formation of the whole Catholic people is so great, to provide a general education for all or even a part of our young people." [39]

Moreover, it is our further belief as Roman Catholics that the Church has an obligation to help all children get a superior education—not simply Catholics or those who attend church schools. Roman Catholic educator, James O'Donahue, director of the education department of the U.S. Catholic Conference proposed . . . "that many of the 13,000 parochial schools close so the Catholic church can aid Negro slum youngsters of all faiths," and suggested three priorities: [40]

1. Devotion of the necessary portion of resources to the education needs of the urban ghetto;

2. religious education [for all Catholics];

3. that area which now occupies the first place—operation of elementary and secondary schools."

There is a great residium of ill will generating among progressive Catholics and it arises for this reason: If the government begins to finance general education in parochial schools, their existence will be perpetuated, and efforts at church renewal frustrated. If this occurs, the school system will continue to dominate the life of the church and absorb the energies of

[38] Supra, Note 36 at 108.

[39] Ryan, M. *Are Parochial Schools the Answer* (1964) at 137, 138.

[40] Swomley, "Ecumenism and the School Aid Issue" *The Christian Century*, June 4, 1969.

priests and sisters who should be out helping the poor and fighting for social change, or providing for the religious education of all Catholics.

The basic tenets of NAL, and of many other Catholics, on the subject of perpetuating the existing public school system can be summed up as follows:

1. Before any perpetuation or expansion of the Catholic school system is considered, we must carefully evaluate our basic philosophy for maintaining a separate school system in accordance with the determinations of Vatican II.

2. The church must evaluate the need for its religious educational program. Once that has been determined, priorities in serving those needs must be established. The entire resources of the church must then be committed to the attainment of these established goals. Only when the religious formation of all is attained, can we even consider perpetuating a general educational program for the few.

For purpose of this free exercise argument only, we will assume the validity of the public welfare purpose of the "Nonpublic Elementary and Secondary Education Act" (P.L. 109). The effect of providing funds for the secular education of Pennsylvania school children attending Catholic schools is an immediate abridgment of the right of individual Catholics to the free exercise of their religion.

If the immediate concern of the state is to aid the public welfare by financing the secular education of Catholic school children, the consequence of this action is governmental assistance in perpetuating the existence of these schools. The indirect, but none the less important, effect is to discriminate against a considerable number of Catholics who believe, with the utmost sincerity, in the renewal of the Catholic religion. These people are genuinely concerned that unless church renewal is accomplished, the church will no longer be a viable force in the Christian world, particularly among the young. "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Sherbert v. Verner*, 374 U.S. 398, at 402 (1963).

The members of NAL and our ideological brothers in the Catholic church can be generally categorized as progressive minded Catholics. An essential ingredient of renewal, and that shared by NAL people is, as the people of God we have a covenant with each other to share our faith and love with all mankind. Our beliefs, our tenets, are intrinsically directed toward renewal and a mature understanding of religion, and not a child-centered one.

The financial aid given to parochial schools under Act 109 is injurious to our efforts to pursue renewal of the Catholic church. The heart of individual liberty is freedom from direct governmental coercion in the realm of ideas, beliefs, and opinions. *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

The real issue in this free exercise claim is that the public welfare statute, designed to promote the secular education of non-public school children, meets head on with a major effort by a large number of Catholics to strive for the renewal of their church. Opposition to church renewal is sufficiently difficult within the confines of the church itself, without the added aggravation of governmental intervention. The intrusion of government has given added, substantial incentive to the perpetuation of the existing Catholic school system. Our concept of renewal involves a restructuring of our entire educational system, with the emphasis upon religious education for all Catholics before a general education can be given to some.

The first amendment to the constitution provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The first amendment's free exercise clause has been made applicable to the states through the fourteenth amendment. *Cantwell v. State of Connecticut,* 310 U.S. 296 (1940). The free exercise clause safeguards the free exercise of the chosen form of religion. Thus the prohibition against abridgment involves two concepts: Freedom to believe and freedom to act. The first is absolute but the second imposes relative considerations. *Cantwell v. State* of *Connecticut,* supra. Given the absolute right of the state to enact legislation for the welfare of the general public, the de-

termination must then be made, when a religious freedom clause is asserted, whether the interest of the state is in conflict with the overriding interest of free exercise protection.

For example, in *Braunfeld v. Brown*, 366 U.S. 599 (1961), the public interest involved the provision for one uniform day of rest. The indirect result of the statute was a prohibition of Sunday sales of certain goods. This public interest was weighed against the religious practices of those who did not observe a Sabbath simultaneously with that of a majority of the community. The interest of the public was upheld principally upon the basis that the interference did not abridge a religious practice; but did render its practice somewhat more expensive. But in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the public interest in determining and ensuring the integrity and veracity of Notaries Public was held insufficient to justify the substantial abridgment of the religious freedom of applicants from a required oath of belief in God.

And in *Sherbert v. Verner*, 374 U.S. 398 (1963), we find the public interest in the administration of the State's unemployment benefit program was not sufficient to justify substantial infringement of the claimant's constitutional right to free exercise of religion. The Court in *Sherbert* held that the South Carolina law which denied unemployment compensation to a Seventh Day Adventist who, because of her religious beliefs, had declined to work on Saturday was a law which prohibited the free exercise of religion.

The presumable effect of Act 109 upon the religious freedom of renewal minded Catholics is particularly analogous to the doctrines of *Sherbert* and *Torcaso*. If Act 109 is to withstand the constitutional challenge of free exercise abridgment, it must be either because the act works no infringement upon the free exercise rights of Catholics (the predominant recipients of aid), or because any incidental burden on free exercise may be justified by a "compelling state interest. . . ." *Sherbert v. Verner*, supra, citing also *NAACP v. Button*, 371 U.S. 415 (1963).

NAL submits that it is imperative that the Court be informed regarding the motivation of Catholics who are striving, as well as sacrificing in a very real sense, for the renewal of our

religion. The underlying concept of the renewal movement is an absolute, irrevocable commitment to Christ and Christian principles. Our present generation is imbued with human concern and the church appears unable to respond. Renewal of this religion can only be accomplished through a Catholic educational system which is capable of reaching all Catholics and not just the few who are able to obtain the benefits of parochial school education.

Authorities and expert opinions cited in this argument attest to the powerful renewal forces operating in the Catholic church as a result of Vatican II. NAL is overwhelmingly convinced that the effect of Act 109 is to obstruct this renewal effort, and thereby infringes upon the religious freedom of renewal minded Catholics.

But even if it is established that Act 109 infringes upon the religious freedom of a large number of renewal minded Catholics, the next issue for consideration is whether some compelling state interest justified the substantial infringement upon free exercise rights. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area" *Sherbert v. Verner*, supra, "[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins*, 323 U.S. 516 (1945).

Efforts by conscientious, renewal minded Christians to reform their church cannot be categorized (perhaps other than in the minds of the hierarchy) as a grave abuse, endangering paramount interest. The effect of financial aid to Catholic schools is to offer assistance to those Catholics who appear unwilling to commit the church to the establishment of priorities in Christian education. The Supreme Court has firmly decided that government must be neutral in matters of religious theory, doctrine, and practice. "It may not be hostile to any religion . . .; and it may not aid, foster, or promote one religion or religious theory over another or even against the militant opposite." *Epperson v. Arkansas*, 393 U.S. at 104 (1968).

In weighing the value judgment required under a free exercise claim, the exclusion is inescapable that the effect of Act

109 is to interfere with the religious beliefs and practices of progressive Catholics. The Commonwealth involvement has tipped the balance toward governmental restraint on religious practice. *Walz v. Tax Commission of City of New York*, 367 U.S. 488 (1970).

The issue raised in these arguments is not the issue of priority of educational goals as seen from the eyes of progressive or traditional minded Catholics. Certainly the issues of priorities and allocation of resources must be determined among the membership, including the leaders of the Catholic church. The court should not in any way consider the matter of intra-church ideological concepts. But the issue, the overriding issue is, that the state has absolutely no constitutional authority to intrude into this church dispute by offering financial assistance to one of the combatant parties. The Commonwealth of Pennsylvania, in enacting Act 109, has done precisely that, and this conclusion may be easily established in an evidentiary hearing. We must conclude that no compelling interest of the Commonwealth can work to infringe the religious freedom of renewal minded Catholics. *Sherbert v. Verner*, 374 U.S. at 407 (1963).

Moreover, NAL submits that if the Court finds a compelling state interest in promoting the secular interest of children attending non-public schools, and such interest does work an abridgment of free exercise, the statute must be declared invalid unless the State can establish that no other means are available whereby the State may accomplish its purpose. *Braunfeld v. Brown*, 366 U.S. at 607 (1961), and *Sherbert v. Verner*, 374 U.S. at 407.

NAL respectfully urges for the Court's consideration that there are methods of promoting the secular interest of children in non-public schools by means other than direct financial aid. Certainly the use of public funds to pay bus fares of parochial school children has only limited, if any, free exercise abridgment. *Everson v. Board of Education*, 330 U.S. 1 (1947). Lending of textbooks to students in parochial schools, *Board of Education v. Allen*, supra, does not work a substantial abridgment upon free exercise of religion. Dual enrollment programs whereby parochial school students would spend part of their

day as public school students should not be considered as a substantial abridgment of religious freedom nor a substantial interference with efforts at church renewal. These are alternatives currently pursued but have not as yet attained wide acceptance. We urge the court to consider these as possible, realistic alternatives open to the Commonwealth in determining whether the State's public welfare purpose is compelling.

The issue of compelling need raises one last question which should be brought to the attention of the Court, and it is indirectly related to the possible alternatives listed above. That question is: Is there a compelling financial need requiring the Commonwealth of Pennsylvania to promote the secular education of children attending Catholic parochial schools?

One of the major factors influencing many legislators to acquiesce in proposals of aid to parochial schools is the fear that Catholic schools will be forced to close. The assumption that parochial schools will close is not necessarily sound. For example, the noted educational sociologists Andrew Greeley and Peter Rossi declare in their 1966 study "The Education of Catholic Americans" (Aldine) that "there is . . . nothing . . . to suggest that the Catholic educational system will not continue into the forseeable future." [41] Commenting upon the future of Catholic, parochial schools, they add: "Most Catholic education correlates with social class and Catholics are improving socially and economically. There will in all likelihood be an increased demand for desks in Catholic schools." [42]

It is no secret that the Catholic hierarchy refuses to make known the facts about its general finances to Catholic laity or even to the various state legislatures. NAL has, from its very beginning, requested, urged, and demanded that bishops "make an account of their stewardship." Nevertheless, few, if any, American dioceses provide full financial disclosure to the members of the Catholic church. The National Association of Laymen declared in January of 1969 that laymen have a "responsibility to divert support to other Christian works when the church's financial status remains veiled in secrecy." The maga-

[41] Supra, note 40 commenting upon Greeley-Rossi study.

[42] Ibid.

zine, Christian Century, reported that NAL, in 1969, called for a moratorium on Catholic school construction until the "existing crisis in all areas of Catholic education is studied by an independent research agency." [43]

In this article by Dr. John M. Swomley, Jr., the Christian Century continued in their discussion of Catholic church finances:[44]

> And the Jesuit weekly America recently stated editorially: "Without formal budgets, adequate accounting and cost analysis and annual financial reports, we do not really know what Catholic education is costing the Catholic community. It is true that we must know and that we organize our schools so that we shall know."
>
> As of now, however, the hierarchy has been deaf to such protests. And here is one of the clearest reasons for opposing public aid to parochial schools. It would —to say the least—be unwise for our government to make appropriations for any organization whose finances are kept secret from both the public and its own members.

The plea for full financial disclosure is by no means limited to Catholic laity. At least one American bishop has spoken out for such disclosure. Bishop Joseph L. Bernadin, general secretary of the United States Catholic Conference stated that complete accounting of Roman Catholic school finances would show the public the serious money crisis existing in parochial schools. The bishop is quoted in the National Catholic Reporter as follows: [45]

> Perhaps in the mechanics of the thing it is impossible to reveal school finances without publishing total church financial resources" . . . If we don't let the public know the seriousness of the school situation, how can we expect the public to help? . . . Whatever is done about Catholic education must be done in terms of the total teaching mission of the church which includes those

[43] Supra, note 40.

[44] Ibid.

[45] National Catholic Reporter, April 14, 1969.

> children in and out of Catholic schools—elementary, secondary, college, and adult education. . . . According to this principle we would start with the educational needs of all and then apportion our resources accordingly. If the resources were not sufficient, we would have to establish priorities. . . .

Certainly the argument is heard that the financial condition of churches is not within the realm of governmental concern. Nevertheless, legislative history of current state aid attempts set out allegations and unsubstantiated claims regarding the poor financial condition of parochial schools. It appears certain that if such unsupported allegations are made, and financial aid considered upon the validity of these allegations, then the State has a firm obligation to determine the accuracy of such claims.

We submit for the Court's consideration that the issue of compelling need of this "public welfare" legislation is open to inquiry whether such a need really exists, in the absence of an affirmative showing of financial need by Church authorities. Further, the Commonwealth should be required to establish, to the satisfaction of the trier of facts, that an alternative form of assistance is not available, i.e., direct financial assistance from the Church itself.

CONCLUSION

The National Association of Laymen respectfully submits that no decision should be made in this case without full consideration of all available evidence, and urges the court to remand the case to the District Court below for further action consistent with this recommendation.

Respectfully Submitted,

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January 15, 1971

FILE COPY

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

RESPONSE TO CERTAIN MOTIONS TO FILE BRIEFS AMICUS CURIAE

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RESPONSE TO CERTAIN MOTIONS TO FILE BRIEFS AMICUS CURIAE

Appellee Schools hereby respond to:

1. Motion For Leave to File Brief Amici Curiae by Center for Law and Education, Harvard University, *et al.*, filed January 25, 1971.
2. Motion For Leave to File Brief Amicus Curiae by National Association of Laymen, filed February 8, 1971.

3. Motion For Leave to File Brief for Connecticut State Conference of Branches of the NAACP, Connecticut Civil Liberties Union, *et al.*, as *amici curiae*, filed February 2, 1971.

4. Letter dated February 3, 1971 (filing date unknown) of Peter Costas, Esquire, attorney for the last-named *amici curiae*, requesting opportunity to present oral argument before, during, or following oral argument in the *Lemon*, or *Tilton*, or *Earley* or *Robinson* cases.

I. THE MOTIONS SHOULD BE DENIED AS VIOLATING, IN THE EXTREME, THIS COURT'S REQUIREMENT OF TIMELINESS

The Motions and the letter have all been presented to the Court upon the eve of the generally expected time of oral argument in the above-entitled case. The Clerk, by letter dated January 25, 1971, notified all counsel in the *Lemon, Tilton, Earley* and *Robinson* cases that they should be present for oral argument on March 2, 1971. Rule 42(3) provides in part:

> "3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may *timely* be presented to the court." (Emphasis supplied).

The Center for Law and Education sought consent of Appellee Schools only on January 8, 1971, this consent being then promptly refused.

The National Association of Laymen sought consent of Appellee Schools on October 12, 1970. The consent was neither given nor refused, in view of the fact that the letter seeking consent did not specify any position which the Association would take. Again it is to be

stressed that, even if the Association considered the consent to have been refused, it filed its Motion only on February 8, 1971.

Connecticut State Conference of Branches of the NAACP, Connecticut Civil Liberties Union, *et al.*, never sought Appellee Schools' consent to file a brief *amicus curiae* in this case. Therefore those entities have not even observed the antecedent requirement respecting refusal of consent.

The letter of Peter Costas, Esquire, seeking leave to make oral argument, must be deemed to depend upon the foregoing Motion of Connecticut State Conference of Branches of the NAACP, Connecticut Civil Liberties Union, *et al.* This, and the Motion, followed upon the unsuccessful attempt of the same organizations, in concert with counsel for Plaintiffs in *Lemon, DiCenso, Earley* and *Robinson,* to have the Court delay its projected hearings in *Lemon, Tilton, Earley* and *Robinson* until such time as a case not yet appealed should possibly be brought before it.

Each of the three motions has been accompanied by a brief of an average length of 37 printed pages, with a total of 227 separate citations to authority, plus various exhibits and appendices. An extraordinary burden is thus sought suddenly to be thrust upon all parties Appellee in *Lemon,* as well as upon this Court. In no sense can these Motions be deemed timely. *Lemon* v. *Kurtzman* has now been before this Court—to the knowledge of counsel for each of the groups now seeking to present a position therein—since April 20, 1970 (probable jurisdiction noted), the appeal therein having been filed on December 17, 1969. All have had abundant time within which to seek to file briefs.

Appellee Schools readily consented to the filing of all briefs *amicus curiae*, those adverse to their position and those favorable to their position, for which consent was timely sought, *viz.*,

BRIEFS ADVERSE

Americans United for Separation of Church and State (brief filed May 27, 1970).

United Americans for Public Schools (brief filed June 1, 1970).

American Association of School Administrators (and six other organizations) (brief filed July 10, 1970).

American Jewish Congress (and four other organizations) (brief filed July 15, 1970).

BRIEFS FAVORABLE

School District of Philadelphia (brief filed August 7, 1970).

The Long Island Conference of Religious Elementary and Secondary School Administrators (brief filed August 10, 1970).

Pennsylvania AFL-CIO (brief filed August 10, 1970).

Attorney General of Ohio, Cleveland Public School District; Youngstown Public School District (brief filed August 11, 1970).

City of Pittsberg (brief filed August 12, 1970).

National Association of Independent Schools (brief filed August 13, 1970).

School District of the City of Scranton (brief filed August 13, 1970).

City of Erie (brief filed August 13, 1970).

Citizens for Educational Freedom (brief filed August 13, 1970).

National Catholic Educational Association (and for other organizations) (brief filed August 14, 1970).

Polish American Congress, Inc. (and 14 other organizations) (brief filed August 24, 1970).

National Jewish Commission on Law and Public Affairs (brief filed August 27, 1970).

The Motions and the letter in question are objectionable in other respects, so far as proper practice before this Court is concerned. The Motion of the Center for Law and Education, for example, purports to speak for ten schools, or groups of schools. Yet not one of these is identified even to the extent of providing its address. Nor do the Motions of these applicants reveal any interest which is not already extensively represented in briefs of parties and of *amici* already timely presented to the Court. No prejudice can possibly result to any interest—whether organizational or merely ideological—from strict compliance with the Rules which this Court has laid down in order to help insure orderliness of procedure and fairness in result. But the gravest injury can result to litigants at whom growing practices related to so-called "associational jurisprudence" or "litigational engineering" are directed—practices ranging from *in terrorem* press conferences at the start of sponsored litigations, efforts

in concert to manage the calendar of hearings, and other devices for pressuring the Court.

Respectfully submitted,

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v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

PETITION OF APPELLEES FOR REHEARING AND SUPPLEMENTAL OPINION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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PETITION OF APPELLEES FOR REHEARING AND SUPPLEMENTAL OPINION

For Appellees to tell the Court that it committed fundamental error is done with painful reluctance. With most Courts, there is always a higher court to which an aggrieved party can go. However, from this Honorable Court, there is no further tribunal—legislative or judicial—which can redress the grievances which Appellees believe genuine. This Petition for Rehearing is submitted from a sincere and honest belief that the Court's decision in this case will result in a gross miscarriage of justice which can and should be avoided.

Pursuant to Rules 58 and 59 of this Court, Appellees herein petition this Honorable Court for Rehearing and for Supplemental Opinion in the matter of *Lemon, et al.* v. *Kurtzman, et al.*, No. 89, decided June 28, 1971. The grounds for this petition are summarized as follows:

I. The Opinion of the Court Must Be Clarified and Delimited Since the Court Erroneously Assumed Facts Not of Record in Adjudicating the Issue of Constitutionality.

II. The "Entanglement" Test, as Now Employed in *Lemon,* Is Contrary to This Court's Prior Rulings on the Establishment Clause and Lacks Rational Basis.

III. The "Entanglement" Concept, as Given by the Court in This Case, Is a Suppressant of Religious Liberty.

IV. The Court Should, by Supplemental Opinion, Remove the Suggested Disapproval of Free Political Expression by Religious Groups.

V. The Court's View of Establishment Is Founded in Part Upon a Misreading of History.

I. The Urgent Need for Clarification of the Decision.

Unlike the companion Rhode Island case (*DiCenso*), the *Lemon* case came to this Court before Answer and Trial, upon grant of a Motion to Dismiss Under Rule 12(b)(6). It thus presented the sole question of the sufficiency of the Complaint's allegations. In accepting those allegations "for the purposes of our review" (*Lemon* v. *Kurtzman,* Slip Op., 16) this Court must have deemed the review and allegations to be confined to the sufficiency of the Complaint, and not to make ultimate findings of operative facts and constitutionality.

Obviously the hypothetical admissions to test the sufficiency of a pleading as to seven named schools (this not being a class action—see pp. 5, 9, *infra*) could not support a final nullification of the challenged statute. Nevertheless, the opinion of this Court declared in unqualified language:

> "We hold both statutes are unconstitutional." (Slip Op., 2)
>
> ". . . for we conclude that the cumulative impact . . . arising under the statutes in each State involves excessive entanglement between government and religion." (Slip Op., 9)

The quoted language and other language of the combined *Lemon-DiCenso* opinions, equate the disposition of two critically different cases, one of which reviewed final disposition after trial below, and the other (*Lemon*) of which reviewed only the propriety of a pre-trial motion. This was sufficiently misleading, whatever the Court's intent in remanding *Lemon,* to convince not only the news organs and lawyers across the nation, but also the Reporter of Decisions of this Court, to conclude and report that the *Lemon* decision constituted a final nullification and termination of the Pennsylvania statute, with respect to all nonpublic schools and in all circumstances. See headnote, *Lemon* v. *Kurtzman* (Slip Op., II).

In effect, the Court's opinion can be read as a sweeping declaration of invalidity of the Act as applied to all the 1,181 contracting nonpublic schools, regardless of their actual character, control or purposes—this being based solely upon the characterization of Roman Catholic schools in Rhode Island which the Court articulated from the *DiCenso* record into its *Lemon* opinion.

If, as we believe, this Court did not intend to go beyond ruling on the sufficiency of the Complaint, the tremendous mischief that will ensue from the common misconception of the decision should be rectified by a Supplemental Opinion. In the interest of justice, and of fair notice to all interested citizens and officials across the land, and to avoid the inevitable dispute on remand, with attendant harm in delay, costs and premature statutory termination, this Court should clarify the scope of its decision at this time. If it does not, it will surely invite multiplicitous litigation and a second appeal to this Court for clarification, no matter whose interpretation might be accepted below on remand.

If this Court intended, as we do not believe, to strike down the statute as to all schools, (or even as to schools, such as Appellee Akiba Academy and non-denominational schools, which have no church relationships) without an opportunity to rebut and test the facts alleged in the Complaint, it will not only have denied Appellee Schools and other non-public schools of their right to a day in court, but will have also deprived all interested schools of a rational interpretation and application of this Court's constitutional standards; and as well of a considerate interpretation of the severability of the state statute. Such a broadside nullification would surely constitute an advisory, as well as premature and unfounded, adjudication. It is for this reason that the dissenting Judge below (Hastie, C. J.) concluded his constitutional discussion with a limited ruling on the motion:

> "As to Lemon's First Amendment claim, the motion to dismiss should be denied." (Appendix A-112).

In their brief to this Court, Appellee Schools took considerable pains to delineate the precise posture of this case (Brief of Appellee Schools, 16-20), in order to avoid any confusion between the procedural issue of the sufficiency of the Complaint with the substantive issue of the truth and pertinence of those allegations *qua* different schools, upon Answer and Trial. The perpetuation of such confusion by an overbroad appellate opinion is especially unjust in view of Appellants' abandonment of the class action, upon challenge by Rule 23(c) Motion (Appendix A-39-42, A-54). Prior to the ruling on the Motion to Dismiss, the Court below properly delimited the scope of the Complaint and its allegations, to apply only to the seven schools selected as defendants by the Appellants:

> "4. In the light of plaintiffs' Answer to Defendants' Motion under Rule 23(c), It Is Further Ordered (a) that the within action shall not be maintained as a class action; and (b) that the last sentence of paragraph 7 of the complaint and similar allegations of like nature contained in the complaint need not be answered by defendants." (Appendix A-54).

Indeed the lack of reference to this in the *Lemon* opinion, raises the question whether the Court overlooked this crucial delimitation of the allegations of the Complaint. Pursuant to the quoted Order, Appellees filed a Motion To Strike Representative Allegations of the Complaint (Appendix A-7, A-67-71) which was pending and not ruled upon when the Motion To Dismiss was granted.

On such a record, it seems clear that this Court could not have intended to elevate and treat the allegations

of the Complaint as adjudicated constitutional facts governing all statutory relationships of all non-public schools.

A. ONLY THE SUFFICIENCY OF ALLEGATIONS OF AN UNANSWERED COMPLAINT IS BEFORE THIS COURT.

As shown by the docket entries in the Appendix, the Appellee Schools filed several concurrent motions in order to obtain clear notice from plaintiffs which of the shotgun allegations of the Complaint were directed to the respective named defendant schools and which were directed to classes of schools not named as defendants. Only after Appellants elected not to accede to the Motion For A More Specific Statement, or to the Rule 23(c) Motion, and only after the Appellants (in our view inconsistently) demanded a three judge court, was the Complaint dismissed under Rule 12(b)(6). Thus the entire pleading context, as well as Appellees' specific selection of the Motion to Dismiss, indicates an intent to admit facts only for the purpose of testing the sufficiency of the Complaint. Were this not so, Appellee Schools would have filed Answers making admissions, and employed Motions for Summary Judgment. Indeed, the Appellee Schools believed (and still do) that many of the averments accepted as well-pleaded facts by this Court are bare legal conclusions. Since Appellees selected the proper form of Motion to limit the effect of their admissions under the Federal Rules of Civil Procedure (Wright & Miller, Federal Practice and Procedure §§ 1356 at 592; 1355 at 587 (1969)), the issue they raised, and their admissions, cannot be expanded on appeal to preclude their disputing the Complaint allegations on remand. Since these are the same allegations which underlie this Court's reasoning,

there can be no final adjudication of facial unconstitutionality at this stage.

1. *This Court does not render advisory opinions.* In the absence of properly adjudicated constitutional facts, a literal reading of the Opinion of the Court in *Lemon* would give it the character of an advisory opinion. On such a fundamental doctrine, this Court hardly requires any citation, but two recent admonitions by several Justices of this Court bear repeating here, for they are peculiarly pertinent to the complexity and importance of the issues in this case:

> "Constitutional adjudication is a responsibility we cannot shirk. But it is a grave and extraordinary process, one of last resort. And when it cannot legitimately be avoided, it is a function that must be performed with the utmost circumspection and precision, lest the Court's opinions emanate radiations which unintentionally, and spuriously indicate views on matters we have not fully considered." *Jenkins* v. *McKeithen,* 395 U.S. 411, 433 (1969) (Harlan, Stewart, White, JJ, dissenting).

> "This case is not simple for another and more immediate reason. We do not know the facts of the case. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts."

> * * *

> "The precipitous action of this Court aborting a trial not yet completed is not the kind of judicial conduct which ought to attend the disposition of a great issue."

> " 'Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feel-

ings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.' "

"With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a law suit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's vital welfare." *New York Times* v. *United States,* 39 U.S. Law Week 4897, 4890 (Burger, C.J., dissenting, June 30, 1971). See also Harlan, J., dissenting *id.* at 4891, 4892; Blackmun, J., dissenting, *id.* at 4894.

2. Upon reversal of the dismissal under Rule 12(b)(6) Appellees are, of right, entitled to file Answers and to proceed to trial upon relevant facts placed in dispute by their respective Answers. The procedural due process rights of the Appellees to deny the Complaint allegations by Answer, following a denial of Motion To Dismiss, are specifically preserved by Rule 12(a) of the Federal Rules of Civil Procedure which extends the time for filing Answer to ten days following final disposition of Motion to Dismiss. That this right is not lost by the effective denial of such a Motion on appeal is made clear by this Court's action in a recent case which, procedurally, presents a direct and governing parallel to the situation at bar. In *Jenkins* v. *McKeithen,* 395 U.S. 411 (1969), the plaintiffs, as here, sued in a federal district court seeking from a three judge court a Declaratory Judgment and Injunction on allegations that a Louisiana statute violated the Due Process Clause of the federal constitution. As here, the District Court dismissed the Complaint on Motion,

but the Supreme Court reversed the dismissal on the view that the Complaint was sufficient to state a cause of action. In doing so, however, the Court opinion took care to avoid going beyond the issue presented:

> "We also wish to emphasize that we do not hold that appellant is now entitled to declaratory or injunctive relief. We only hold that he has alleged a cause of action which may make such relief appropriate. It still remains for him to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process." *Id.* at 431.

3. *There is no basis to treat the Motion to Dismiss as a Motion for Summary Judgment.* Federal Rule 56 which is designed to test the merits, (as against the formal sufficiency) of the Complaint, could not be, nor was it, invoked either below or on this appeal. The plaintiffs did not file any Motion under Rule 56, nor did they request any hearing, or attempt to present any evidence in support of such a motion. At no time was there any proposal, by any party or by the court below, that summary judgment proceedings be undertaken as the foundation for treating the Motion to Dismiss as a Motion for Summary Judgment.

4. *Appellants voluntarily abandoned their class action below and the Court below excluded the class action allegations from the case.* As delimited by the Order of the Court below, following abandonment by Appellants of their class action (see p. 5, *supra*) the Complaint allegations cannot now be deemed to apply to any but the seven named defendant schools; hence the action cannot pertain to the total operation of the statute which embraces all nonpublic schools, including

nondenominational and interdenominational schools. Even as to the defendant schools, the Complaint made no allegations concerning their classroom activity or management, other than the broadest conclusions regarding their dual purposes. The Appellee Schools filed a Motion For More Specific Statement which was not ruled upon, and they are surely entitled to pursue that Motion, as well as to dispute by their Answers the allegations which impute to them unconstitutional activities or relationships. There is, therefore, no foundation as to any nonpublic schools for a statutory nullification.

B. THERE IS NO BASIS FOR SUPPLYING DISPUTED CONSTITUTIONAL FACTS IN THE GUISE OF JUDICIAL NOTICE.

In *Board of Education* v. *Allen,* 392 U.S. 236 (1968) this Court properly refused to indulge in loose speculation concerning the stereotyped, often mythical, as well as outdated, characterizations of church-related schools. While there is no suggestion of formal judicial fact-finding in the opinion of this Court in *Lemon,* the broad opinion language might be taken by some as implying judicial notice of the very facts which Appellee Schools and other schools may well demand trial upon. This misconstruction should be avoided by clarifying Supplemental Opinion.

The proposed Rule 201 of the Proposed Federal Rules of Evidence (March, 1971) entitled "Judicial Notice of Adjudicative Facts" reflects the view that facts which are subject to reasonable dispute should not be judicially noticed, and further that:

> "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request

may be made after judicial notice has been taken." Proposed Federal Rule of Evidence 201(3)—Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

Needless to say, no party has had the opportunity to demand a hearing because no judicial notice has been undertaken. But if and when such judicial notice may be proposed to classify the operation of any nonpublic schools, including the Appellee Schools, the undersigned counsel propose to vigorously challenge the propriety of such, and to demand a hearing to produce proofs thereon. For the fact is that generalized impressions of church-school relations, even as held by otherwise learned men, can be grossly ill-founded in this period of rapid and radical changes within all church associations, and especially where they are based on pejorative 19th century caricatures.

The fact is that there are different kinds of Catholic schools, parochial and non-parochial, diocesan and non-diocesan. There are different kinds of Jewish schools, synagogue and non-synagogue. There are different kinds of Protestant schools, from the relatively unstructured Unitarian and Quaker to the fundamentalist Adventist and Calvinist. There are interdenominational schools that may be less church-related than even nondenominational nonpublic schools. Judicial noticing on such a varied mass by selected references either from bygone times or from unrepresentative examples would substitute gross guesswork for critical fact-finding.

Unlike much smaller states, Pennsylvania has a markedly varied pattern of nonpublic education. The variety arises not only between nondenominational and church-related schools, but also between different de-

nominations and within given denominations. The numerous Catholic schools are, contrary to popular myth, greatly diverse in their operations and church relationships. The private Catholic schools are differently related to church authority than are parish schools; and the administration of high schools is also distinct from the administration of parish schools. Finally the operation of any one of these categories of schools varies significantly from one diocese to another. These facts can be adduced at trial and properly placed before this Court. Unlike tiny Rhode Island, Pennsylvania contains eight independent dioceses of the Catholic Church. Thus it would be inherently unfair to place such schools under a blanket constitutional ban, without affording them the opportunity to demonstrate to a court that their relationships and operations in connection with the Pennsylvania statute do not involve the unconstitutional relationships described by this Court's decisions.

C. THE CHALLENGED STATUTE EXPRESSLY PROVIDES FOR SEVERABILITY TO PRESERVE ITS OPERATION, BOTH AS BETWEEN SCHOOLS HAVING DIFFERENT CONSTITUTIONAL STATUS AND STATUTORY FORMS OF AID HAVING DIFFERENT CONSTITUTIONAL IMPACT.

Independently of all the foregoing considerations, the express severance provision of the Pennsylvania statute and the distinctions drawn by this Court between different forms of aid suffice to make total nullification of that statute, at any stage of judicial proceedings, unnecessary and beyond the proper province of adjudication.

The Pennsylvania legislative will as to severability should be respected, and it is crystal clear:

> "Section 9. Severability.—If a part of this act is invalid, all valid parts that are severable from the

> invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect, in all valid applications that are severable from the invalid applications." (Appendix A-25).

Thus the legislature excluded the possibility of a numbers or percentage game, as Appellants would suggest, in terms of how many excluded schools or applications might or might not be sufficient to justify a total destruction of the statutory operation. Obviously the legislature has decided that question and determined that the statute should be severed and saved as to any school or any application that was constitutional. There is, therefore, no basis to conclude that the legislative purpose has failed. The statute should, therefore, stand as to all qualified schools and aid forms in accordance with the legislative will.

In its *Lemon* opinion, this Court properly refused to impute to the legislature a motive or design to help any particular kind or group of nonpublic schools. That ruling requires that the statutory beneficiaries and programs that are not under the ban of this Court's standards should not be deprived of the statutory operation.

Even in the absence of such a foursquare provision, there is nothing in the legislative educational aid tradition in Pennsylvania to justify an implication of nonseverability. If the Pennsylvania legislative enactments prove anything, it is that the legislature has aided nondenominational private schools at all levels, independently of church-related schools; and the Appellees stand ready to produce proofs to this effect, to negate the suggestion that the legislative intent was not to help as many schools as it constitutionally could.

Further, the statute is expressly made severable as to those forms of aid which, even under this Court's reasoning, would be constitutional as to all schools, namely books and instructional materials. Thus, as to any schools interdicted from receiving teacher salaries, but not books and materials, the statute, as to those schools, could be saved by the simple expedient of severing out the simple words "teacher salaries", without in the least upsetting the balance of the legislative scheme.

By carefully delimiting its opinion in *Lemon*, this Court would properly leave open the severance issues for further consideration. It provided the example for doing so by its severance action to preserve the statute in the *Tilton* case, and in other recent cases. See *e.g.*, *Connell* v. *Higgenbotham*, decided June 7, 1971, 39 U.S. Law Week, 4722.

1. The disparity of the nonpublic schools covered by the statute. As delineated at page 11, *supra*, the great variety of nonpublic schools embraced by the statute, but not embraced by the Complaint below or by the opinion of this Court, are entitled to protection from precipitate nullification of the statute in question. By legislative declaration the statute is intended to benefit those schools not falling under a specific constitutional ban. Their interests have not been placed before the Court, and Appellants elected to preclude their being brought before the Court in the Rule 23(c) proceedings below. It would be grossly unfair to them, as well as to Appellee Schools, to strike down a statute without affording them an opportunity to confront and contest parties who seek to destroy their interests in the challenged statute.

2. The statute provides distinct aid forms and programs, namely, teacher salary reimbursements, and re-

imbursements for books and instructional materials, as to which this Court indicated constitutional distinctions. Under this Court's opinions, different constitutional considerations enter into the validity of teachers' salaries *vis-à-vis* books and materials, thereby raising issues of severability as between these forms of aid. Those issues should receive further consideration, for it is clear that the channel or directness of aid is not *per se* controlling. In *DiCenso* the aid was indirect, but nullified. In *Tilton*, the aid was direct, yet upheld. While other considerations may bear on the validity of "non-ideological" forms of aid, they have not been fully explored. Hence the statute should not be totally terminated without a further consideration of those issues upon remand.

For all of the foregoing reasons, Appellee Schools submit that this case should be reconsidered upon rehearing, with a Stay of Mandate pending the issuance of a clarifying Supplemental Opinion. This matter is far too important to the quality and stability of education for millions of Pennsylvania's children to subject it to the almost certain and unnecessary risk of conflicting and improper interpretations of this Court's original opinion. This would be true even were the Court to adhere to its rationale and application of the "entanglement" thesis.

With all respect, however, Appellees suggest that the very difficulties outlined above are engendered by the thesis of "entanglement" as an independent constitutional standard. For the elevation of the undefined notion of "entanglement" into an independent constitutional standard, cut loose from the sound mooring of government neutrality to religion and from the objective test of secular purpose and primary effect, unduly

exalts but one of a complex of related policies underlying the Religion Clauses, policies which are necessarily in tension and which must be kept in balance if religious liberty for *all* citizens is to be accommodated and preserved in our pluralistic and pervasive welfare state.

II. THE "ENTANGLEMENT" TEST, AS NOW EMPLOYED IN LEMON, IS CONTRARY TO THIS COURT'S PRIOR RULINGS ON THE ESTABLISHMENT CLAUSE AND LACKS RATIONAL BASIS

A. THE "ENTANGLEMENT" TEST, AS APPLIED IN LEMON, IS CONTRARY TO PRIOR RULINGS.

The Court, in *McGowan, Schempp* and *Allen,* had provided a test which, for the decade preceding *Lemon,* the Court had considered as *the* test which it had evolved in order to determine whether a given piece of legislation would "withstand the strictures of the Establishment Clause". To this "purpose-effect" test it ascribed, in *Schempp,* a lineage going back to its decision in *Everson. School District of Abington Township.* v. *Schempp,* 374 U.S. 203, 222 (1961). This test, centering on the concept of "neutrality", received express affirmation in the *Walz* decision of 1970, 397 U.S. 664, 669 (1970). In *Walz,* it is true, the Court (clearly by way of dictum) spoke of "involvement" and "entanglement". Plainly it employed these highly descriptive nouns, not in order to fashion any *new* test of constitutionality, but to highlight important aspects of the "purpose-effect" test. The Court's whole discussion of "entanglements" in *Walz* centers upon whether these have a primary effect of advancing or inhibiting religion and upon nothing else. Indeed, the passages in *Walz* which deal with "entanglement" make no sense if one attempts to read them *apart from* consid-

eration of primary effect. For example, in *Walz*, the Court speaks of:

> —the fact that "[G]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." (*Id.* at 674). What sense did it make to point to such benefit if the benefit did not advance religion?
>
> —the fact that the "involvement . . . is a continuing one calling for official and continuing surveillance . . ." (*Id.* at 675). What sense did it make to point to such surveillance if the surveillance did not inhibit religion?
>
> —the fact that "[T]he hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches . . ." (*Id.* at 675). What sense did it make to speak of either if the effect was not that religion would thereby be inhibited or advanced?

Reason plainly dictates that "entanglement" cannot be employed as an *independent* standard of adjudication, divorced from the concepts of secular legislative purpose and primary effect of advancing or inhibiting religion. *Can it be seriously maintained that legislation which, having a secular legislative purpose, does not either advance religion or inhibit religion, can be called other than neutral in its effect?* In the common and sensible understanding of every man, that which does not help and does not hinder is neutral, and never until its decision in *Lemon* v. *Kurtzman* did the Court venture to say that legislation which is religiously *neutral* is at one and the same time offensive to the Constitution as an *establishment of religion.*

The "entanglement" teaching, in effect, creates a special exception to the neutrality test. This special exception is itself non-neutral.

B. THE "ENTANGLEMENT CONCEPT IGNORES EQUALLY IMPORTANT POLICIES THAT MUST BE RESPECTED TO PRESERVE GOVERNMENT NEUTRALITY TO RELIGION.

This Court has consistently recognized that religious liberty and its corollary, government neutrality to religion, are the paramount goals to be served by the Religion Clauses, whether read alone or in combination. By seizing exclusively upon "entanglement" in *Lemon*, this Court has deprived nonpublic school children and their parents of the protection of these goals, because it has ignored the crucial facts which justify government aid to nonpublic education.

It is *government* which, by intensively taxing the average citizen, at the federal, state and local levels, has caused the inability of citizens to pursue nonpublic education without some form of participation in government aid. It is *government,* not church groups, which has created the conditions which lead to the demand for distributive justice in educational aid. It is *government,* therefore, which is the cause of the very conditions which it seeks to redress by aid to nonpublic schools.

The practical, albeit the unintended, restrictions placed by government regulations upon the pursuit of religiously motivated conduct under state Sunday closing and unemployment compensation laws did not rise to the level of denial of free exercise since Sabbatarians could have complied with the government scheme at the cost of their own economic impoverishment. But this Court has never hinted that state government could not redress those government-created disadvantages by supplemental legislation designed to liberate the Sabbatarian from those cost burdens in the practice of their religion. So in *Lemon,* there is no *qualitative* differ-

ence in the degree of government neutrality and government accommodation by the state which seeks to aid education of persons in nonpublic schools who would otherwise be denied civic benefits as the price of their exercise of intellectual and religious freedom. In both cases there is no denial of religious practice but only an effective loss of government benefits. Thus the same *qualitative* test of neutrality through accommodation that is afforded to Sabbatarians should be applied to nonpublic school adherents.

It is of the essence that the same *qualitative* standard be applied to all religious groups. And the *quantitative* question of the permissible degree of accommodation must remain a factual issue to be determined upon trial. This issue cannot be fairly buried under a delusive *qualitative* legal standard of "entanglement".

C. "ENTANGLEMENT", AS EMPLOYED BY THE COURT, IS A STANDARDLESS STANDARD.

The consequences of the "entanglement" doctrine, as newly employed by the Court in *Lemon,* should now be weighed, because they are broader by far than the upsetting of Pennsylvania's narrow program of support for teaching children four secular subjects. One consequence is that the entirely sensible "purpose-effect" test becomes useless. It is obviously of no significance what the purpose of legislation is, or what its effect may be, if it can be said to involve something (namely, "entanglement") which is simply a *relationship* not necessarily having any identifiable purpose or effect at all.

At once appears a further consequence, and one that is ominous in terms not only of freedom of religion but broadly in terms of principles governing constitutional adjudication:

If "entanglement" is employed as an *independent* standard, rather than as a part of the purpose-effect test, then a "standard" is invoked which is not standard at all because (as will be seen *infra*) its application can only depend upon completely subjective factors. If such a standard is employed in this case, there is no reason why similar standardless standards cannot be employed in any other kind of constitutional adjudication. If such a standard is employed solely in cases involving state aid to education in parochial schools, that fact alone gives concern that it is not an arbitrary device seized upon *ad hoc* as a means of holding such aid void. The independent "entanglement" standard has indeed never until this case been employed by this Court as a *ratio decidendi*. Its inherently arbitrary character is seen very clearly in its employment herein:

1. *Application of the "entanglement" standard in the present state of the record is arbitrary.* There has been no trial in *Lemon*. Therefore the Court has had no record facts on which to go respecting the relationships which the Court calls "entanglement". With that state of the record, it is vain to speak, as does the Court, of a "cumulative impact of the entire relationship" which somehow causes "excessive entanglement between government and religion". Of what parts does this whole (of "cumulative impact") consist? The Court does not and cannot say, because there was not an iota of testimony before the Court as to *whether in fact* the so-called "surveillance" took place in the classrooms, *whether in fact* self policing and discipline were not observed by the teachers in keeping with the statute, *whether in fact* the auditing gave rise to any sort of state surveillance of class-

room instruction, *whether in fact* the Pennsylvania statute did not differ from the program upheld by the Court in *Tilton* solely by involving a *lesser* degree of "entanglement" between school and state than was present in the program upheld in the latter case.*

2. *Absent a factual record, the determination of "entanglement" is necessarily pure guesswork.* The Court stated:

> "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." (Slip op. 16).

The Court, however, does not provide even a single citation to history, or to any authority, to support this statement. The Brief for Appellee Schools set forth extensive documentation (pages 47-53 and Supplements B, C and D) to *demonstrate* that the experience in Pennsylvania is contrary to this hypothetical danger.

The Court, affording no basis for its conclusions respecting history, and ignoring the abundant available information based upon extensive past and present relationships between government and church-affiliated welfare bodies, then turns to what can, with due respect, only be termed *speculation* as to what

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* The contrast between the Court's views in *Lemon* and *Tilton* is striking. One could not imagine a more substantial "entanglement" than one in the concrete (literally) form of permanent accessions to the real estate of a church-related institution, under a government surveillance program which this Court, in *Tilton*, by its own hand, lengthens from a 20-year period to forever. By contrast, the Pennsylvania program consists of nothing but an *operating* program, *annually terminable*.

evils will flow from the Pennsylvania program. The Court is unwilling to raise this speculation to the status of actual prediction:

> "The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow." (Slip op. 17).

The Court further quotes its own dictum from *Walz*, that "a direct money subsidy would be a relationship pregnant with involvement" (*Id.* at 16). But just as not every pregnancy results in birth, so not every relationship results in pregnancy. To hint at a conclusion—totally unfounded in the record—and to use that hint as the basis for striking down a state's legislation is extraordinary and plainly calls for reconsideration.

More important, however, is the fact that these speculative dangers are in themselves irrelevant. Act 109 reimburses schools for part of the cost of (a) books and instructional materials (b) teacher salaries. Wherein does the supervision and control—related to books and instructional materials under Act 109—differ qualitatively from the supervision and control related to the same under the act upheld by this Court in *Allen*? (The program in *Allen* involved determinations of secularity by the State, the filling out of forms, and accounting. See Brief of Appellee Schools 51.) This critical question is neither raised nor answered by the Court and yet it goes directly to the heart of this case. Wherein, moreover, does the continuing supervision and control of the use of government-supplied materials seen in Act 109 differed qualitatively from that sanctioned by the Court in *Tilton*?

Wherein, indeed, does the character of the teacher who serves in a church-related school differ qualitatively from that of a teacher who serves in a public school? As we stated upon oral argument, there are people of intense religious and ideological commitment in the public schools, including, in Pennsylvania, ordained ministers and rabbis and teachers in Mennonite garb. Pennsylvania trusts these people to exercise self-surveillance with respect to the religious views to which they are committed.

3. *The "entanglement" standard as now employed in Lemon lacks rational basis.* The Court states:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid which the State provides, and the resulting relationship between the government and the religious authority." (Slip op. 10).

It is elementary, that the *"character and purposes"* of an institution are distinct from whatever *relationship* that institution may have to any other entity. (Certainly the Court did not mean to imply that if it has a relationship, such relationship must result in any form of "excessive entanglement".) To this commonsensical proposition the Court writes in one exception: the church-related school. Such a school is defined by this Court to indicate that it presents an excessive degree of "entanglement"—on the benefit side, *i.e.,* for aid purposes but not on the burden side, *i.e.,* for costly compliance with governmental regulation of that school. This contradiction of "entanglement" in relation to aid but not in relation to governmentally enforced expenditures by the school,

illustrates the fallacy of treating the "entanglement" concept as a self-executing and rational legal standard. In the unique case of the church-related school, the Court presumes that the character and purposes of the institution somehow define the degree of relationship (*i.e.*, "excessive" or "non-excessive") which that institution will have with the state. That is to say, regardless of whether the factual record would disclose that the institution's relationship with the government neither advances nor inhibits religion and is in fact a benign, lightly regulated, trouble-free, socially beneficial relationship, the sole and mere fact that the institution has religious purposes and is under religious control may cause that relationship to amount to an excessive entanglement, *as a conclusion of law.*

What is more, just as this conclusion of law is not founded upon record fact, neither is it founded upon judicial notice. *It can therefore be said to be nothing more than this Court's personal and subjective judgment, not remotely related to any previously known principle of law.* This Court concludes that the fact that an institution is religious, inevitably and unexceptionably contributes to its having a relationship with the state which amounts to "excessive entanglement".

That the determination of "entanglement" depends more upon predilections and presumptions, rather than upon any rational measure, is further illustrated by the following questions:

How are courts, under the *Lemon* opinion, to classify church relationships arising out of placement of public wards at public expense in orphanages, homes for de-

linquents and protectories (all of which involve educational programs) which are run by churches?

How should courts treat government aid to hospitals, homes for the aged, and chaplaincies? Is the court to pick and choose which programs are constitutional by self-generated conclusions respecting "entanglement", without reference or deference to legislative judgments, and without opportunity by the state or by church institutions to make intelligible proofs at trial of non-excessive "entanglement" on behalf of the affected parties?

4. *The "entanglement" standard cannot be applied to religiously diverse institutions, without doing manifest injustice to some.* The Court's thesis is: that the character and purposes of the institutions benefited constitute a key factor in determining the existence of "excessive entanglement". The Appellee Schools, as noted herein, have widely differing characters and purposes. It would be preposterous on its face to assert (absent evidence) that Appellee Akiba Hebrew Academy has the same "character and purposes" as Appellee Germantown Lutheran Academy, or that the latter has the same "character and purposes" as Appellee St. Anthony's School. That being so, the Court's presumption that "excessive entanglement" is found in the case of all of these schools—and in the remaining 1,179 contracting schools in the Commonwealth—is without foundation.

III. THE "ENTANGLEMENT" CONCEPT, AS GIVEN BY THIS CASE, IS A SUPPRESSANT OF RELIGIOUS LIBERTY

While the "entanglement" concept, as employed by the Court in *Lemon*, is not capable of utilization as an independent standard for constitutional adjudication, it is clear that its employment directly entails vices long interdicted by this Court.

A. THE COURT'S FORMULATION OF THE "ENTANGLEMENT" RATIONALE, NAMELY HYPOTHETICAL FEAR OF "DANGER", IS DESTRUCTIVE OF THE LIBERTY OF THE TRUE STATUTORY BENEFICIARIES.

At no point did the Court's opinion in *Lemon* question the integrity of the legislative intent or in so many words attack the integrity of the schools and teachers receiving reimbursement for educating children in secular areas. The Court dwelled constantly, however, on the possibility of *"danger"* of unconstitutional actions or relationships. This process of reasoning is not only alien and contradictory to this Court's jurisprudence relating to First Amendment freedoms, but is utterly invidious in singling out for special adverse treatment nonpublic school student beneficiaries who might well claim a denial of the spirit of the due process and equal protection principles of the constitution.

1. *The "entanglement" approach presents all the vices of arbitrary and discriminatory government action which this Court has deplored for other branches of government.* As a matter of due process protection, the prospect of *"danger"* has never been accepted by this Court as a basis for governmental limitations of free expression whether by the press, by teachers or by publishers of obscene material, nor has the

"danger" club been employed to justify imposition of loyalty oaths or to deny exemptions to conscientious objectors. Nor has *"danger"* been sufficient to justify denial of equal protection in access to government jobs by suspected subversives or to legislated welfare payments by transient citizens and aliens. On the contrary, this Court has held unconstitutional any legislative action or disqualification grounded upon *"danger"* as being constitutionally repugnant whether cast in terms of vagueness or overbreadth.

2. *The vices of vagueness, overbreadth, and dragnet classifications are present.* The dragnet approach based upon *"danger"* should be no more imposed upon religious groups by this Court than by legislators and enforcement officers whose actions this Court has nullified. The hazards to liberty of "unfettered discretion" in making arbitrary and discriminatory judgments, not tied to rational standards and proofs should no more be countenanced (much less, imposed) by this Court to disqualify persons who adhere to nonpublic education either from religious motivation in the case of denominational schools, or from intellectual motivation in the case of all nonpublic, including nondenominational, schools. To do so would be to place the Religion Clauses in direct conflict with the equal protection principle—a conflict which is clearly untenable and contrary to the ideal of government neutrality. That the Religion Clauses embrace an equal protection principle was most recently noted by Mr. Justice Douglas, dissenting, in *Gillette* v. *United States,* 91 S. Ct. 828 (1971):

> " 'The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal jus-

tice under law.' Zorach v. Clauson, 343 U.S. 306, 320, 72 S. Ct. 679, 687, 96 L. Ed. 954 (dissenting). We said as much in our recent decision in Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228, where we struck down as unconstitutional a state law prohibiting the teaching of the doctrine of evolution in the public schools: . . ."

* * *

"'The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.' Id., 103-104, 89 S. Ct. at 270.

"While there is no Equal Protection Clause in the Fifth Amendment, our decisions are clear that invidious classifications violate due process . . .

* * *

"A classification of 'conscience' based on a 'religion' and a 'conscience' based on more generalized, philosophical grounds is equally invidious by reason of our First Amendment standards.

* * *

"'. . . freedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order.'"

3. *The Court sacrifices the substance of the Pennsylvania statute—aid to citizens—to the statute's form in channelling distribution through their service institutions.* That the *Lemon* opinion, in real life terms, chills freedom of intellectual and religious expression is undeniable; and that factor must be weighed against the posited danger of excessive entanglement. By disqualifying reimbursement for services rendered to and consumed by citizens to insure their quality education, in the name of institutional separation, this

Court denies those citizens the very *breathing room* for the exercise of their freedom through necessary associational activity. This is equally true of *Lemon* as of those cases wherein legislators attempted to abridge the associational activities pursued by teachers, Negroes, communists, and other distinct minorities. The many cases in which this Court has held such actions against the group activity to be unconstitutional abridgements of necessary associational activity, as bracketed to individual liberty, are legion and familiar to this Court.

In brief, the Appellees request this Court to uphold the spirit of the constitutional law, and not be guided by a vague notion of *"danger,"* since only the reality of a statutory benefit and the spirit of the law will give civic liberty the life and legitimacy it deserves.

IV. THE COURT, SHOULD, BY SUPPLEMENTAL OPINION, REMOVE THE SUGGESTED DISAPPROVAL OF FREE POLITICAL EXPRESSION BY RELIGIOUS GROUPS

For reasons given in the foregoing, it is abundantly clear that reargument of this case is called for, and a resultant Supplementary Opinion. But one other part of the *Lemon* opinion also warrants correction. That is Part IV, dealing with a "broader base of entanglement" found by the Court to be presented by "the divisive political potential of these state programs". This part of the opinion will logically be interpreted as a disapproval of political expression by supporters of parochial schools. Its implications go, however, far beyond that minority group in our society and extend to the religious and political liberties of all citizens. The Appellees plead that it be withdrawn by this Court and in this proceeding, since,

except for public opinion, this Court is the forum of last resort in the Nation, and what it has set forth in Part IV can have no other effect than to incite and encourage bigotry and religious conflict.

What the Court has suggested is that a statute aiding the education of children in parochial schools is void because it may occasion public disputes by persons who oppose such aid. The Court, in getting to this remarkable conclusion, which it has never applied in any other instance, singles out *religious* questions as questions about which there must be no public dispute. This it describes as a "broader base of entanglement". This addition to the definition of "entanglement" finally robs that term of its last vestige of neutrality and definiteness as a standard for constitutional adjudication. While earlier in the Court's opinion, "entanglement" seemed to be defined as a *relationship* between church-related institutions and state, and later appeared to mean a *resultant* of the religious nature of an institution and of a statute, here "entanglement" is used to describe the *exercise of the political rights* of speech, assemblage, petition and voting by a class of citizens and irrespective of the actual existence of any statute.

Under this view, in order to find out whether a statute violates the Establishment Clause, a court should apparently first make up its mind as to whether anybody will oppose the enactment or operation of the statute and, if it guesses that there will be opposition, then it must further guess how much. This is an open invitation to those who oppose, let us say, state purchase of useful secular educational services for parochial school children, to *make controversy,* indeed to make a *religious* issue of the matter, now realizing

that the more virulent is their campaign, the more fully is the "divisiveness and controversy" test met. Thus, the appearance of peaceableness in this test vanishes and its true face is seen, as a test which incites embroilment.

Under this test, considerations of *law* also vanish. The New York educational program for children, upheld by the Supreme Court, would likely have been terminated and its benefits to young citizens lost had the Court's test been applied. In New York, "controversy" arose as the result of the efforts of citizens to obtain this secular benefit for their children,* and a subjective judgment could have been rendered by the courts that the controversy was substantial. Thus, upon the basis of judges' guesswork that opponents of the program had in fact raised a violent enough hue and cry, the children in question would have been deprived of a substantial educational benefit to which, in *Allen,* this Court found they were constitutionally entitled. While the *Allen* test places religious majorities in states at no advantage, the Court's test places religious minorities everywhere at a *constitutional* disadvantage wherever their opponents decide to light the fires of conflict.

In our own time, a wide variety of federal and state programs conducted by many different religious denominations in the fields of health, welfare and education are, by the Court's new doctrine, inherently unconstitutional. But the reality is that these programs, however initially marked by controversy, were soon met with broad enthusiastic acceptance by the

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* See article, "Assembly Votes Textbook Loans", New York Times, May 12, 1965.

American people. Pennsylvania has afforded a particularly excellent example of this. Amazingly, admittedly without having any facts to go on, the Court says with respect to Pennsylvania:

> "Although *no facts have been developed* in this respect in the Pennsylvania case, it *appears* that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program." (Slip op. 19. Emphasis supplied).

The Court can and should have taken judicial notice of the fact that, after the Pennsylvania program had been in operation and its great merits seen by the public, a *consensus in favor of* the program, even greater than that which had caused its adoption, developed steadily, as the following tabulation of voting by the people's representatives illustrates:

	YEAS		NAYS	
	House	Senate	House	Senate
Act 109 (original Act) 6/11/68	107	30	74	17
Act 86 (Cigarette tax amendment) 3/25/70	114	36	76	8
Concurrence	150	—	57	—
Act 224 (Equalization amendment) 7/31/70	154	46	35	—
Concurrence	179	—	11	—

(Source: Legislative Journal, House and Senate, Commonwealth of Pennsylvania, 1968, 1970).

It is shocking that the Court would pejoratively describe the honest efforts of any group of citizens in the exercise of fundamental political rights of speech, petition and assembly as nothing more than "pressures" *and as though anything whatever in Amer-*

ican law, policy and tradition discountenances the efforts of any group to exercise manifest political rights.

It must now be asked whether the following instances of political activity "along religious lines" constitute "principal evils against which the First Amendment was intended to protect", or whether the sole admissible instance of such evils is the action of supporters of parochial schools aimed at getting programs of state aid for the benefit of American children attending such schools:

—Campaigns by religious groups for or against government spending for abortion and other forms of birth control.

—Campaigns by religious groups for or against Sunday Laws.

—Campaigns by religious groups with respect to Vietnam, Prohibition, welfare rights, gambling, capital punishment, racial discrimination, aid to Israel, relations with the Vatican, trade with South Africa, conscientious objection, obscenity, Bible-reading and prayer in public schools.

Do not all of the foregoing similarly present what the Court calls "religion intruding into the political arena"? Is there not, in each of these situations "the potential for political divisiveness related to religious belief and practice"? Where these are related to elections (as constantly they are) are not "candidates forced to declare and voters to choose"? Will not "many people confronted with issues of this kind . . . find their votes aligned with their faith"? Does not the "potential divisiveness" in these conflicts form as great (or as little) "threat to the normal political

process" as do the efforts of groups of Catholics and other Americans to seek public aid for secular objectives achieved in schools which state law decrees that children must attend if they do not attend public school?

The Constitution was not designed to create a secularist state. Americans have never agreed with the ideas of 19th century French laicism and the German *Kulturkampf,* that religion is a "private matter", and therefore a potential intruder in the public domain to be kept under strict confinement. The American tradition has always recognized that freedom of religious conscience is meaningless unless it includes freedom to express religious or, as in Pennsylvania, *secular,* ideas in public affairs. Professor Freund's highly secularist concept of the public role of religion, as adopted by the Supreme Court of the United States in *Lemon,* is one man's opinion which is clearly contrary to the constitutional traditions of religious pluralism in America. This singular concept is not entitled to elevation, by judicial fiat, to the level of constitutional law.

Under any such view, *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) should now be deemed overruled. There, in a Catholic neighborhood, a proselyting group singled out (to quote the Court in that case) "the Roman Catholic Church for strictures couched in terms which would naturally offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows." *Id.* at 309. The Court, upholding the political rights of the proselyting group, stated:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both

fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." (*Id.* at 310).

The abrasive conduct of the religious zealots, protected by this Court in *Cantwell,* bears no resemblance to the *peaceable and secular* campaign waged in Pennsylvania (in the form of letter writing, orderly appearances at public hearings, the engaging in civil debate, and contacting of legislators) by the supporters of Act 109. Indeed it was not the *supporters* of the Act who deemed it a "religious issue"; they campaigned for the Act precisely on the terms by which this Court describes its purposes:

"... the [Pennsylvania and Rhode Island] statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws." (Slip op. 8).

The Court, in its opinion, says:

"To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to *permit* questions of the Religion Clauses to assume such

> importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems which confront every level of government." (*Ibid.* Emphasis supplied).

We know of no prior opinion in the history of the Supreme Court in which the Court has presumed to state that some issues should be kept out of the forum of public discussion, that the earnest (or foolish) pleas of any group of citizens in the legislatures should not be permitted to "assume importance". Never before has this Court presumed to prescribe for the American people what issues the people are to deem of "importance" and what issues will "tend to confuse and obscure other issues of great urgency." Never before has this Court ventured to proscribe any issue as beyond the constitutional pale of public discussion. The resultant inconsistency between the free speech rights of supporters of public aid to children in parochial schools and the free speech rights of purveyors of pornography is jarring, to say the least.

V. THE COURT'S VIEW OF ESTABLISHMENT IS FOUNDED IN PART UPON A MISREADING OF HISTORY

At numerous points in its opinion, the Court makes mention of history in order to substantiate its views. The Court states:

> "We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches." (Slip op. 19).

The fact is to the contrary. State aid to church-related educational institutions was common until the third quarter of the nineteenth century at the ele-

mentary and secondary level and has persisted at the college level down to the present. See, generally, Gabel, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS (1937). The Pennsylvania Laws of April 12, 1838, contained an express provision permitting the use of public funds for the support of schools "under the care and direction of a religious society." LAWS OF PENNSYLVANIA 1700-1849 (Dunlop), 849. The date of 1838 is significant, since by that year the tide of the Catholic immigration from Europe had not yet been felt in Pennsylvania, and the Commonwealth at that time had a very small Catholic population.

Mr. Justice Brennan's concurring opinion in *Lemon* devotes several pages to history, pointing to the "bitter controversy" which arose in New York over the question of aid to sectarian schools in 1842. The opinion then notes that *"between 1840 and 1875,* 19 states added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools" and that thereafter 16 more states also did. (Slip op. 5-9. Emphasis supplied). Again, the dates are significant, because it was precisely in the period roughly delimited by the years 1840 and 1875 that a *new* concept of church-state relations was forcefully engrafted by the dominant majority upon American public policy. That concept was as unknown to the Founding Fathers as were the conditions of a modern industrial America in which one-seventh of the school population attends parochial schools. That concept centered on *education*—the so-called "school question"—and history points, with unmistakable thrust, at the origins of the "no aid to sectarian schools" concept. While the true intentions of the framers, in writing the

Religion Clauses of the First Amendment, are indeed far from fully revealed by history,* the intentions of those who, by the state constitutional *amendments* originating at mid-nineteenth century sought to impose a new view of disestablishment, are crystal clear. A brief sketch of historical developments in Massachusetts, where the "no aid to sectarian schools" movement was born, and in New York, where the movement achieved its most substantial success in 1894, shows that the "bitter controversies" had their origin, not in the "aggressions of the sectaries" who (according to the current fiction) stirred up "divisiveness" and "controversy" by their "designs on the public treasury", but in a pervasive bigotry which willed the suppression of sincere claims of parental freedom and religious liberty. The attention of the Court is respectfully called to Supplement A hereto which sets forth a chapter of American history profoundly relevant to the issues at bar. The vital interests of millions of American parents, of the financially plagued Commonwealth, of the cities of Philadelphia, Pittsburgh, Scranton and Erie, and the stake which all have in federalism, education, freedom of the mind and religious liberty are too great to allow them to be struck down upon constitutional theories derived from a misreading of history.

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* The simplicist view of the meaning of the Establishment Clause publicized by contemporary opponents of aid to church-related education has been widely rejected or held up to question. See Kauper, Religion and the Constitution (1964); Howe, The Garden and the Wilderness (1965); Katz, Religion and American Constitutions (1964).

CONCLUSION

It Is Respectfully Submitted That This Court Should Accord Appellees a Rehearing and Issue a Supplemental Opinion Herein.

Respectfully submitted,

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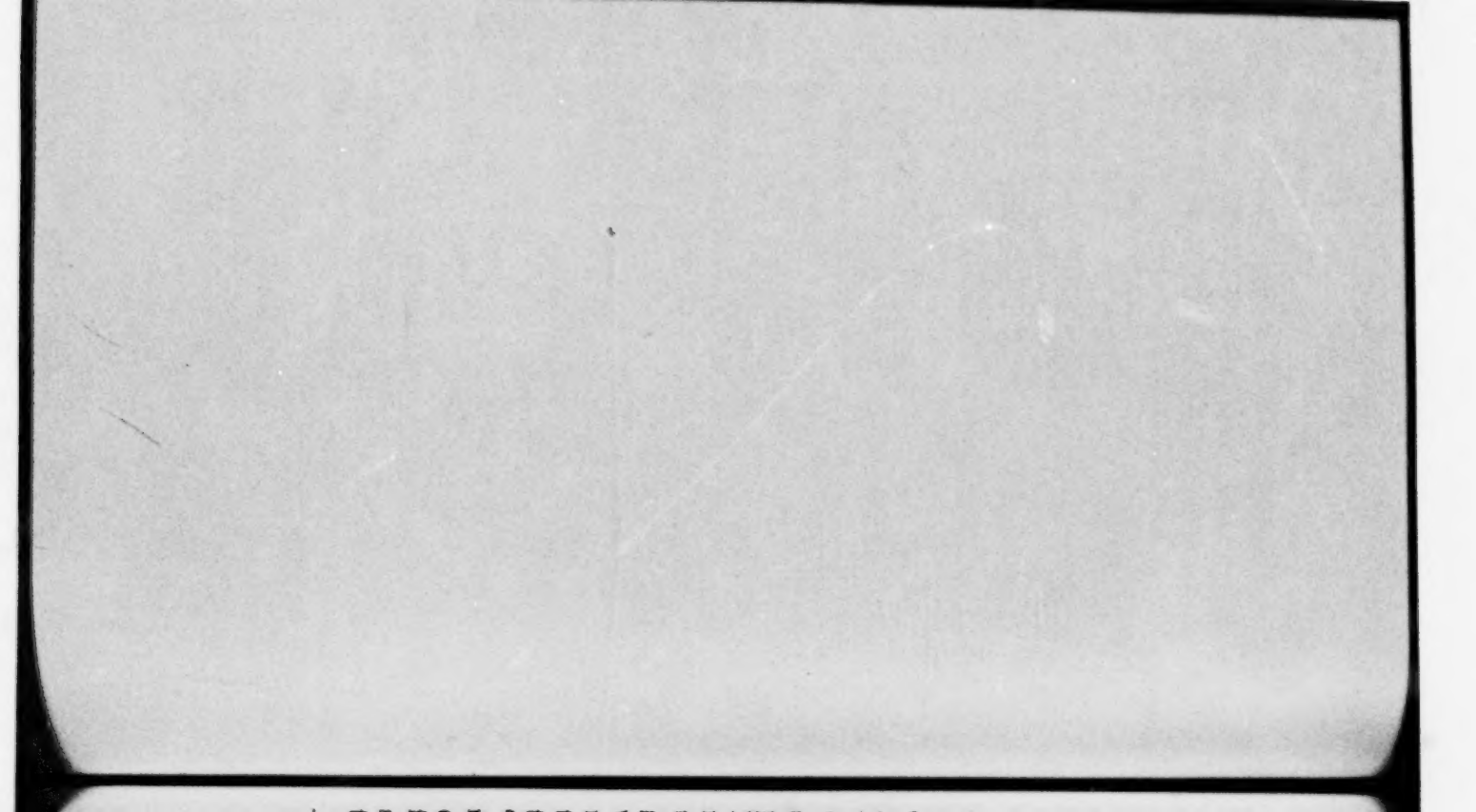
CERTIFICATE OF COUNSEL

As counsel for the Petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/ J. SHANE CREAMER
/s/ WILLIAM B. BALL
Counsel for Petitioners

Dated: July 21, 1971



SUPPLEMENT A

MASSACHUSETTS:

Background of the Anti-Aid Amendment.

The Period of Establishment (1620-1833).

Education in Massachusetts, far from having come about as a secular development, nurtured by church-state separation, was born in the opposite principle of a hard-and-fast church-state union.[1] While civil control of most education in Massachusetts eventually supplanted church control, this education has been, for most of its 350 years, impressed, through state action, with marked religious—and sectarian—characteristics. During almost two centuries preceding the federal and Massachusetts constitutions, all Massachusetts education was intensively permeated with religion. The schools, in which this Bible-centered education was rendered, were at once "town" and Congregational Church schools. Due to the church-state union whereby the civil authority was obligated to promote religion,[2] and to the Calvinist concept of the ends of education, the conclusion must be regarded as correct that while the schools were, in a narrow sense, civil schools, they "remained virtually Congregational parochial schools for many years."[3] Correspondingly, general religious freedom in Massachusetts was unknown. "The absence of freedom of thought, especially on religious subjects, in seventeenth-century Massachusetts is so familiar a fact that a mere reminder should suffice."[4]

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[1] I Stokes, Church and State in the United States, 156 (1950).

[2] Smith, Religious Education in Massachusetts, 10 (1926).

[3] Gabel, Public Funds for Church and Private Schools, 51 (1937).

[4] Levy, Legacy of Suppression, 30 (1960).

In contrast to religious liberty granted them in some of the other colonies, the Charter of Massachusetts Bay, October 7, 1691, while purporting to grant religious liberty to all, expressly excepted Roman Catholics.[5] In 1780 Massachusetts, now a state of the new nation, wrote its first constitution. The Declaration of Rights thereof contained several provisions here significant: Article II enjoined upon all the worship of God. (This provision is still a part of the constitution.) Article III provided express power to the legislature to exact public support of education in the established Protestant religion.[6] This provision is a striking reaffirmation of the union of church and state in Massachusetts, to remain as the fundamental law of the Commonwealth until almost half a century after the national ratification of the Bill of Rights (including the Establishment Clause of the First Amendment). To become modified in 1833, Article III set up in legal contradistinction Protestants and all other persons (of whom there would soon be many in Massachusetts) and awarded to the former a legally enforceable tax-supported dominance in education.

The Period of Protestant Hegemony (1833-1963).

Two main features characterized this period: the coming of the Catholic presence in the Massachusetts community and the effort to maintain Protestant predominance in education in Massachusetts—the latter becoming especially vigorous in response to the former. Both developments have combined to determine in large part the present con-

[5] "... We do by these presents for us, our heirs and successors, grant, establish and ordain that for ever hereafter there shall be a liberty of conscience allowed in the worship of God to all Christians (except Papists) inhabiting or which shall inhabit or be resident within our said Province or Territory ..." Thorpe, Federal and State Constitutions, 3.

[6] Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 223, 224 (1832).

stitutional law relating to church-related education in the Commonwealth.

In 1789 the General Court had adopted a statute enjoining upon school instructors the duty of carrying into practice the principles stated in Article I of the 1780 constitution.[7] There has been much discussion as to why the heavily religious content of common schooling in Massachusetts gave way in considerable part to secular content between the period from the late 1820's to the end of the 1830's.[8] One of the reasons was undoubtedly the effect of the act of 1827 which provided, in part, that school committees might not direct school books to be purchased or used "which are calculated to favor any particular religious sect or tenet."[9] This was an outcropping of a sentiment for disestablishment which resulted in the deposing of Congregationalism as the State Church by constitutional amendment in 1833. But it was neither intended as a secularizing of the schools, nor as an opening to a general religious freedom.

As to secularization, it is clear from abundant testimony —soon to be eloquently reinforced by Horace Mann—that no such thing was intended. The view, instead, had come about, that a distinction could be made between "sectarian" doctrine, on the one hand, and general religious (including moral) instruction, on the other.[10] As to a general religious freedom, there was, at least in 1827, scarcely reason to believe that any religious bodies other than Protestant would be a significant factor in Massachusetts.

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[7] Laws of Massachusetts, 1788-1789, Acts 1789, c. 19, 417.

[8] See generally, Dunn, What Happened to Religious Education? 96-188 (1958); Cubberly, Public Education in the United States, 120-162 (1947).

[9] Laws of Massachusetts, X, c. CXLIII, 562-563.

[10] See the account of Mann's views in II Stokes, Church and State in the United States, 54 (1950).

Here was a society in which almost all were Protestant, whose traditions were nothing but Protestant, and in which Protestant Christianity (without, now, its points of internal dogmatic difference) would predictably be taught for all the future in the schools. The rise of a Roman Catholic population in Massachusetts was soon seen as a direct challenge to what had been, until that rise, a universal Protestantism in that state.

The saturating anti-Catholic education given the Massachusetts populace for two centuries, in the school house, from the pulpit and in popular custom laid the great base of prejudice in the state from which all manner of hostile activity would inevitably arise, once the leaders and followers of the Roman Catholic Church actually entered Massachusetts' boundaries. A leading present-day Protestant scholar, Ray Allen Bililngton, describes this atmosphere:

> "An effective lecture series was founded at Harvard in 1750 by Paul Dudley 'for the detecting and convicting and exposing of the idolatry of the Romish church: their tyranny, usurpations, damnable heresies, fatal errors, abominable superstitions, and other crying wickedness in her high places.' These widely publicized speeches attracted much attention and were normally circulated in pamphlet form. Antipapal feeling was attested even in the everyday life of the colonies: one New England constable refused to publish a king's letter when he suspected that it tolerated Romanism and when singing was first permitted in a Connecticut service a deacon rushed from the church shouting 'Popery! Popery!' Even a game called 'Break the Pope's Neck' was a popular diversion around the New England firesides. School books such as the *New England Primer* were normally anti-Catholic in sentiment and were illustrated with grotesque pictures of the Pope, while by 1774 *A Master Key to Popery* and similar propaganda works were

being advertised in America." Billington, The Protestant Crusade: A Study of the Origins of American Nativism, 16 (Quadrangle Books Ed., 1954).

If that body had been detested in its absence,[11] its physical presence triggered hatred unbounded.

There had been no Catholic church in Massachusetts until 1778.[12] In 1774 Massachusetts, commonly with the other colonies, had experienced a wave of anti-Catholic hostility with the passing of the Quebec Act by which Catholics in Quebec had been given the right to "have, hold, and enjoy the free exercise of the religion of the Church of Rome." Among the fears expressed was that of "their [Quebec's] members daily swelling with Catholic emigrants from Europe."[13] It was in the 1820's that Catholic emigrees became a notable factor in Massachusetts. Perhaps a natural distrust of foreigners, plus the serious increase in the population of the almshouses occasioned by these immigrants (mostly Catholic) made dry tinder for the fires of religious prejudice soon to reach consuming proportions in the No-Popery campaign which now appeared in the state and much of the rest of the East.

Just as Massachusetts' two centuries of anti-Catholic mind-set are essential to understanding of the "establishment" provisions of the Constitution of 1780 and of the No-Popery campaign which took hold in that state in the 1820's, so the latter becomes essential to an understanding of the ascendancy of the Know Nothing Party in the 1950's in Massachusetts, the peak of whose power was achieved precisely at the time the Constitutional Convention of 1853 was sitting. That convention wrote into the state constitution the first "anti-aid" amendment, Article

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[11] Billington, *ibid.*

[12] I Stokes, Church and State in the United States, 419 (1950).

[13] Stokes, *op. cit., supra,* at 786.

XVIII, whereby, a mere twenty years since the Massachusetts Constitution had mandated public support of Protestant education, it now barred public support of any sectarian education. So much has the thinking of the 1853 Convention dominated subsequent sentiment in Massachusetts, that space is given here to chief points made in the debates.

Debate on the amendment began on July 29, 1853, Mr. Parker, of Cambridge, laying the foundation for its defense by stating:

> "Sir, this resolution has nothing sectarian in its character. It proposes simply to retain and secure your common schools in the condition in which they are at the present time, beyond all peradventure, come from what quarter an attempt for change may come—and I care not from what quarter it comes . . ."[14]

Mr. Keyes, of Abington, commented as follows, upon the thrust of the amendment:

> "Every-body knows this resolution appears to be aimed at one class of our citizens, one denomination of religion. Nobody has intimated any apprehension that money would be used for the benefit of Protestant sectarianism. I have never heard that question raised in the State; but the question has been raised in the State, and discussed, in relation to the support of Catholic schools; and I am not willing, as one of the friends of the Constitution, that it should be embarrassed by any such provision. It is too important a question to be passed over in this manner; without any reasons given for and against it; and impatient as we all are to finish our labors here, I hope the Convention will look seriously at this matter before they assent to its being made a part of the organic law."[15]

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[14] III Debates in the Massachusetts Convention, 614 (1853).

[15] *Id.* at 615.

Mr. Wood, of Fitchburg, saw the public schools as sectarian-Protestant, and urged that Catholic schools should be as entitled to aid as such public schools:

"Many of the intelligent Irish do not and will not send their children to our schools. I had a conversation with one of these, a man who desires the advancement of learning as much as I or any man in the State. I asked him why he would not send to our schools. His answer was: 'I will not send my children to a sectarian school.' 'A sectarian school?' said I. 'Heavens! I did not know that our schools were sectarian.' 'Well,' said he, 'that is just the way with you here in America, and with religionists all over the world. Our sect is no sect; every-body else is sectarian. Now,' said he 'what constitutes a sectarian school? It is where you will have all the Protestant forms of worship introduced. You will insist on having prayers according to the Protestant forms. You introduce your Protestant Bibles and other Protestant books, and you will have none other. Now, I put it to you, would you be willing to send your children to be instructed by Roman Catholic priests; to be compelled to read their Bible, and have comments upon it?' I said 'No.' 'Very well, then, you ought not to expect us to do it.' Now, I put it to this Convention, how it is possible to raise any money by taxes to be expended for common schools, if it cannot be expended for either Protestant or Roman Catholic schools?

"Now, let me say another thing. It is all important that our Irish children should be educated. It is as important to us as it is to the Irish themselves. We do not want them to grow up amongst us, ignorant and vicious, first to rob our hen-roosts, and afterwards to commit more serious offences. It is all important that they should be educated. If we cannot educate

> them in such schools as we have, let us give them such schools as they can accept." [16]

He regarded the proposal as a "law against a sect." [17]

Wood was answered by Mr. Lothrop, of Boston, who insisted that "the establishment of common schools, in which the great mass of the children of the community, of all religious denominations, are educated together, is the only way in which we can prevent and keep down sectarianism." [18] Thus was the dual concept of the melting pot and the nonsectarianism of sectarian-Protestant education advanced in the debates.

Much to the fore, in the minds of the anti-aid advocates, was the desirability of heading off, by timely action, the threat which they felt the growth of the Catholic numbers posed, although the historical record is bare of evidence of any troubles being encountered by the public schools of Massachusetts due to Catholics or, indeed, of any "drives" by Catholics for support of Catholic schools. Mr. Chapin, of Webster, a supporter of the anti-aid amendment, admitted as much when he warned that

> ". . . efforts have been made in other parts of the Union. New York and other States have been affected with excitement on the subject. And I think it would be well to consider whether, in this State, we are not approaching the same condition, and whether it is not our best policy, to guard against it in time." [19]

Mr. Butler renewed the opposition, declaring the amendment "the most sectarian resolution that can be brought

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[16] *Id.* at 616.

[17] *Id.* at 617.

[18] *Ibid.*

[19] *Id.* at 619.

before a deliberative assembly."[20] He predicted that it would result in serious trouble for the future, bring a "controversy into the politics of this State." "We teach Protestantism," he said, ". . . But is that any reason why we should force it upon our neighbors?"[21]

Mr. Ball, of Upton, replied, with the plea: "Open your doors wide to all, and banish sectarianism from your schools, and Catholics will become Protestants through the influence of these schools."[22]

The vote taken on the motion to reconsider the amendment failed, 183 noes to 87 ayes.[23]

The careful documentation by Professor Billington of organized anti-Catholic bigotry in Massachusetts from 1800 to 1860 amply reveals the extreme virulence of that campaign and its extraordinary success in the Commonwealth.[24] The burning of the Ursuline convent at Charlestown, in 1834, was but the first in a series of acts of lawlessness to be perpetrated against Massachusetts Catholics prior to the Civil War. Describing the high tide of Know-Nothingism, Billington states that as a result of the fall elections of 1854: "Massachusetts was the scene of the party's greatest victories; there the governor and all state officers were Know-Nothings, the state Senate was made up entirely of representatives of that party, and the state House of Representatives was composed of one Whig, one Free Soiler and 376 Know-Nothings."[25]

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[20] *Id.* at 620.

[21] *Id.* at 621.

[22] *Id.* at 622.

[23] *Id.* at 626. And see discussion of the school fund II Debates in the Massachusetts Convention, 569-577 (1853).

[24] Billington, The Protestant Crusade (1938).

[25] Billington, *op. cit., supra,* 388.

From the 1830's on, through the nineteenth century and well into the twentieth, there were many incidents of protests by Catholics over Protestant practices in public schools in which Catholic children were enrolled. These protests were uniformly turned back, sometimes upon the assumption that these were not "sectarian" practices, sometimes on the view that no evil resulted from a Catholic child's having to receive Protestant-oriented instruction, and sometimes upon both bases.[26] As Catholic population in the state grew, and, with this, the multiplication of Catholic schools,[27] pressures against public aid for these schools mounted.

While there exist statements that the object of Article XVIII was simply to preserve the common school system, by the turn of the century there was no doubt that the anti-aid principle had as its main focus the Catholic schools. Thus the question came again to be excited, with expressions of anxiety that Article XVIII was not a sufficient safeguard against the (always prospective) depredations of the Catholic populace upon the public treasury. An anti-aid measure, broader than Article XVIII, had been before the Massachusetts legislature for fourteen of the sixteen years between 1900 and 1916. It was agitated continually and intensively during that period as a "Roman Catholic" question. It was the chief spur to the calling of the Constitutional Convention of 1917.

Respecting that convention, one commentator has stated:

> "Through the official record cannot show the truth, yet the real cause of the collision over the anti-aid

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[26] Most instructive, in terms of presenting the prevailing attitude, is *Commonwealth* v. *Cooke,* 7 Am. L. Rep. 417 (1859).

[27] Gabel states that in 1886, the growth of private schools surpassed that of public schools in Massachusetts. He infers that this was due to the increase in Catholic schools. Gabel, Public Funds for Church and Private Schools.

amendment was the antagonism of Catholic and Protestant. Years of struggle had occurred over legislative aid to Carney Hospital. Many Protestants feared, with the growing strength of the Catholics, that the latter would become a majority in political power and then would come appropriations of public money to parochial schools. This anti-aid amendment came at this juncture. It had some Catholic support in the convention." [28]

The first large scale debate at the Convention concerned the broadening of the anti-aid provision. Edwin U. Curtis, of Boston, offered the so-called Curtis-Lomasney Amendment, as a 46th Amendment to supplant Article XVIII. He stated that, had the framers of the latter known how much money would be spent on private institutions following 1853, they would have assured that no sectarian institution in the state would have been eligible for aid.[29]

Bishop Frederick L. Anderson, of the Newton Theological School, informed the Convention that 100,000 members of various "patriotic orders" supported the amendment. These orders, and, in chief, a group known as clerically oriented "Minute Men" constituted the shock troops whose aim was to storm public opinion in favor of the proposal:

"The agitation in favor of the anti-sectarian amendment has been carried on for several years by an or-

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[28] Bridgman, the Massachusetts Constitutional Convention of 1917, iv (1923).

[29] I Debates of the Constitutional Convention 1917-1919, 67-68. Of the nearly seven million dollars paid by the Commonwealth to educational and charitable institutions from 1860 to 1899, Catholic charitable enterprises were reported to have received $49,000 and Catholic educational facilities nothing. *Id.* at 176. See also II Bulletins of the Constitutional Convention 1917-1919, 60-79. After 1899 even the charitable institutions received nothing. It was stated that during the past half century the educational institutions receiving state aid included institutions engaged in the training of sectarian ministers.

> ganization known as the 'Minute Men,' counting in its membership some of the most distinguished clergymen of the state. Professor F. L. Anderson of Newton ... was nominated and elected a delegate at large on this issue, directly and avowedly." [30]

As the Minute Men pressed for passage, Protestant clergymen urged the same from the pulpit.[31] Shortly, the effort to push through the amendment was the subject of an intense and bitter religious controversy. John W. Cummings, opposing the measure, declared that the parochial schools had not asked the government for any money whatsoever and he blamed the "patriotic orders" such as the "Minute men" and the "Guardians of Liberty" [32] for the excitement over the issue.[33] He warned that the issue would result only in greater division and hatred in the future. Roland Sawyer, another delegate, stated that he believed that the election of the state's first Catholic governor, in 1913, had frightened many people into believing that a Catholic conspiracy existed. He compared the pro-amendment movement to the operations of the Know-Nothing Party in 1853.[34] William Cardinal O'Connell, Roman Catholic Archbishop of Boston, called the amendment an "insult to Catholics" [35] and urged its defeat.[36] On Election Day, the

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[30] Loring, A Short Account of the Massachusetts Constitutional Convention 1917-1919, VI The New England Quarterly, 15.

[31] *Id.* at 35. See also the Boston Globe, for October 29, 1917, p. 1, cols. 5-6.

[32] See Hennessy, Four Decades of Massachusetts Politics, 1890-1935, 210.

[33] Debates, *supra*, at 77.

[34] *Id.* at 183-184.

[35] Boston Globe, October 29, 1917, p. 1, col. 3.

[36] Boston Globe, November 5, 1917, p. 1, cols. 1-2.

Massachusetts Council of Churches urged approval.[37] The amendment was adopted that day by a vote of 206,329 in favor and 130,357 opposed.

NEW YORK:

BACKGROUND OF THE BLAINE AMENDMENT

The New York Constitutional Convention of 1894 cannot be understood except in the context of the history which preceded it. A highly visible issue in the convention was the question of imposing the constitutional prohibition which became the Blaine Amendment. While this was officially spoken of as the question of "aid to sectarian schools," it was popularly discussed and considered to be "the Catholic question."

The subject of the Church of Rome and Roman Catholics had been a deeply rooted, traditional preoccupation of a large majority of Americans in the colonies and in the nineteenth century republic. It had two foci: the fear of "Popery" and (especially after 1820) the fear of the immigrant. As Canon Stokes has stated, speaking of the anti-Catholic "Nativist" movement which thereafter swept the East Coast: "* * * it was the Roman Catholic 'foreigner' as the supposed emissary of the Pope that chiefly aroused the rabble."[38] The Know-Nothing Party, at mid-century, spearheaded this sentiment with immense political success. This party had its origin in New York City. Its Almanac stated its purpose:

> "Anti-Romanism, Anti-Bedinism, Anti-Pope's Toeism, Anti-Nuneryism, Anti-Winking Virginism, Anti-Jesuitism, and Anti-the-Whole-Sacredotol-Hierarchism with all its humbugging mummeries. Know-Nothingism is for light, liberty, education, absolute freedom

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[37] Boston Globe, November 6, 1917, p. 2.

[38] A. Stokes, I Church and State in the United States, 83 (1950).

of conscience, with a strong devotion to one's native soil."[39]

The success of this movement in New York, and its unremitting propaganda efforts up to the opening of the Civil War, laid a foundation in inherited family attitudes and popular consciousness which was to have marked effect in the postbellum decades.[40] While an important irritant, prior to the Civil War, in which the anti-Catholic and anti-immigrant sentiments had been intermixed was the burden upon public charities which the newly arrived, often indigent, aliens produced, an equally potent irritant, following the Civil War, was the education question.

The New York tradition in education had been, from the Dutch colonization forward, a religious tradition. When the common schools emerged in the mid-nineteenth century they were "as devoted to religious as to secular instruction."[41] The religious instruction was Protestant

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[39] Clinchy, Everett, R., All in the Name of God, 69, 70, as quoted in Stokes, *supra*, 838.

[40] These attitudes are described by Ray Allen Billington:

"All types of reading matter were utilized by those who employed the printed word to shower calumny on Catholicism. Children whose primary instruction was from one of the primers in common use were accustomed to crude engravings of Protestant martyrs and to sentiments placing Popery in alignment with heathenism and infidelity. Infant minds were shaped to believe that 'to be a Catholic, was to be a false, cruel and bloody wretch,' and that Popery included everything that was vicious and vile. The school training was often supplemented by parental instruction, for the women of America embraced the No-Popery cause with more enthusiasm than the men. Sincerely believing that their prejudice should be shared by their offspring, they instilled into their children an enduring hatred of Catholicism." R. A. Billington, the Protestant Crusade, 347 (Quadrangle Books ed., 1964).

[41] J. Pratt, Religion, Politics, and Diversity, 164 (1967).

—eventually a "nondenominational" Protestantism being the basis of the religious and moral training.

As early as 1840, Catholic citizens, unable in conscience to accept this kind of education for their children, increased their efforts to found their own schools and to obtain public aid for them. These efforts—augmented following the Civil War—met with stout resistance from the dominant Protestant majority and were repulsed, except for a few short-lived accommodations.[42]

A strong counter-agitation on the education question ensued, soon blending with an intensely revived campaign of propaganda, which, while centered on that question, manifested a far broader anti-Catholic hostility, denunciatory of the danger of "Papists in all the high places of the nation, with the control of cities and states, our Sabbath abolished, our educational system in ruins, Romanism established, and sustained by law * * * our religious freedom gone." [43]

This campaign built up to a peak in the decade immediately preceding the Constitutional Convention of 1894. The work of the convention, in its drafting and adopting of Article XI-3,[44] cannot be realistically appraised except in relation to that movement which, indeed, found its culminating expression in that provision.[45]

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[42] See generally, Pratt, *supra*, 158-203.

[43] From Mtehodist Quarterly Review, L. (1868) 531, as quoted in Pratt, *supra*, 202.

[44] The original numbering of the provision was Article 9, section 4, the present numbering having been adopted in 1938. The present numbering is employed, for purposes of clarity, throughout this article.

[45] The two chief organizations in New York which conducted the propaganda were the Central Committee for Protecting and Perpetuating the Separation of Church and State, to which generous and prestigious sponsorship was given by John Jacob Astor, John D. Rockefeller and Cornelius Vanderbilt, and the American

A logical resultant of the pressures thus built up was a twofold focus of the discussions in the convention: (a) that there should now be established a constitutional bar, prohibiting public grants to sectarian educational institutions; (b) that the vice of all such grants lay simply in the nature of the institution as sectarian.

As to the first point of focus, its extremely *negative* character is to be noted. The dominant sentiment which swept to triumph in the convention was not upon *whether* the serious economic and moral problem in education faced by millions of Catholic citizens might be solved through some accommodation, respecting their schools, which would also protect the public interest. Rather, the sentiment was that of slamming the door in the face of imminent and mortal threat. This, in turn, accounts for

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Protective Association. The latter was a nationwide organization. The foremost authority on the "A. P. A.," Professor Donald L. Kinzer, states that its national influence peaked in the years 1893-1895. D. Kinzer, an Episode in Anti-Catholicism: The American Protective Association, 95-212 (1964). In 1894 the A.P.A. wielded a powerful influence in the State of New York. *Id.* at 145-147. Pratt relates that in the Convention, "the spearhead of the anti-Catholic thrust was the National League for the Protection of American Institutions, whose New York backers included J. P. Morgan, Cornelius Vanderbilt, Cyrus W. Field and John D. Rockefeller." Pratt, *supra*, 229-231 (1967). As each of these organizations was the direct descendant of the Nativist movement and the Know-Nothing Party, so each—with its casting of suspicion upon the citizenship and trustworthiness of Catholics and their Church leaders, its effort to promote hysteria over the threat which Catholic schools were said to pose to public education, and its violent appeal to latent, and sincere family-nurtured hostility to Catholicism—sowed the seeds which would find expression, in the new century, in the sordid excitements to be engendered through the Ku Klux Klan, POAU, the Smith campaign of 1928 and the Kennedy campaign of 1960. See W. Randall, The Ku Klux Klan: A Century of Infamy (1965); G. Myers, History of Bigotry in the United States, 140-295 (1943); L. Creedon and W. Falcon, United for Separation (1959); II A. Stokes, Church and State in the United States, 331-333, 406-410 (1950); M. and H. Josephson, Al Smith: Hero of the Cities, 350-400 (1969); P. Barrett, Religious Liberty and the American Presidency (1963).

the second point of focus: consideration of the public functions of sectarian educational institutions were dismissed as beyond the pale.

Nothing is found in the convention records to indicate that any serious discussion was had of the social value or public benefits conferred upon New York society by her sectarian schools. One thing alone mattered: that they were sectarian educational institutions. Or rather what mattered was that these sectarian educational institutions were mainly *Roman Catholic*. That, unhappily, is the unanswerable testimony of the historical record.

While there was but a handful of sectarian schools in New York that were not Catholic, Protestant and Jewish welfare institutions were numerous—especially the former. And herein is found further testimony to the specifically anti-Catholic thrust of the convention in relation to the education question, as contrasted with the "charities" question. While the convention adopted Article XI, section 3, as its answer to the education question, it adopted Article VIII, section 1,[46] as its answer to the charities question.

Professor Pratt reports the argument of the Republican delegate, George Bliss, in favor of nonapplication of Article XI-3's church-state separation principle to charities:

> "Bliss went on to say that 'no money is taken [by virtue of Article VIII-1] from the State Treasury or City Treasury in aid of any denominational or ecclesiastical body * * * [or] for the

[46] "* * * nothing in this constitution contained shall prevent a county, city, or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, or from providing health and welfare services for all children. * * *"

dissemination of tenets of any religious body.' Public aid to sectarian charities went for services actually performed, and for nothing else. 'The money appropriated is certainly, so far as Catholic institutions are concerned, appropriated for the support of those who are in them and whom the State would have to support, if not in those institutions, then elsewhere.' The system of public aid, originally begun to assist Protestant orphan asylums in 1849, was now widely accepted as humane and necessary and should not be overturned for transient reasons. 'In an economical point of view it helps the State by throwing upon private benevolence a portion of the expense which otherwise would fall wholly upon the State.' Bliss returned to this economy argument again and again. He also stressed the humanitarian theme: the present system of charitable grants 'gives to the wards of the State the advantage of the private care—of the personal interest—which cannot be got in an institution managed by officers of the State.'' [47]

The Bliss statement (which came to represent the consensus) is notworthy. It first says that public expenditure for church-related welfare organizations is not "in aid of any denominational or ecclesiastical body." That is to say nothing other than that public moneys may flow to a religious institution without having any necessary effect of aiding its sponsoring church qua church.

This is an especially important observation in view of the fact that the church-related welfare institutions, of which the new "charities" Article VIII-1 took cognizance, carried on [48] extensive educational functions, and in view of the further fact that the Protestant charitable institutions (particularly those devoted to child care and delinquent females) were famous for the zeal with which

[47] Pratt, *supra*, 249-250 (1967).

[48] And still do.

they sought to inculcate Protestant religious and moral teachings. Bliss's statement that no public money would, under Article VIII-1, be "for the dissemination of tenets of any religious body" flew in the face of the obvious fact that *all* religiously affiliated welfare agencies carry out religious as well as secular educational functions.

Indeed, the new Article VIII-1 expressly recognized this fact with its careful specification of "*secular* education of inmates of orphan asylums, homes for dependent children" * * * (etc.). In the Bliss statement we see an insouciant word-play, attempting to create a constitutional distinction between "welfare" and "education"—a confusion which has been perpetuated to the present by a few commentators opposed to meaningful aid to educational endeavors of parochial schools.[49]

As described by Bliss, the "secular educational function" of a church-related social institution is publicly supportable. As paraphrased by Professor Pratt: "Public aid to sectarian charities went for *services actually performed,* and for nothing else." (Emphasis supplied.) The secular educational function was thus deemed separable, for purposes of public support, from the religious function.

Two further concepts of towering importance appear in the Bliss statement: (1) the *public* interest served through savings effected to the State by the sectarian social agency; (2) the public interest in preserving meaningful individual freedom of choice in a pluralism of private institutional options ("* * * gives to the wards of the State the advantage of the private care—of the personal interest —which cannot be got in an institution managed by officers of the State").

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[49] See, e.g., Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), and note comment upon Professor Freund's views in Valente, Aid to Church-Related Education—New Directors Without Dogma, 55 Va. L. Rev. 579, 601 (1969). See also Valente and Stanmeyer, Public Aid to Parochial Schools—A Reply to Professor Freund, 59 GTWN, L. J. 59 (1970).

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1970

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Nos. 569, 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island,

Appellants,

and

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Intervenor-Appellants,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

On Appeal from a Three-Judge United States District Court for the District of Rhode Island

MEMORANDUM FOR APPELLEES

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MEMORANDUM FOR APPELLEES

This memorandum is submitted in response to the separate Jurisdictional Statements filed by the Defendants-

Appellants Rhode Island Commissioner of Education and other officials and the Intervenor-Appellants.

In this case, a three-judge District Court unanimously held unconstitutional the Salary Supplements Act of the State of Rhode Island on the ground that it violates the First Amendment to the Constitution of the United States.

Although we believe that the decision of the court below was correct, we suggest that probable jurisdiction be noted. This Court has already noted probable jurisdiction in the case of *Lemon, et al.* v. *Kurtzman, et al.*, No. 89, October Term, 1970, and *Tilton, et al.* v. *Richardson, et al.*, No. 153, October Term, 1970. In the former case, a three-judge District Court in Pennsylvania dismissed a complaint challenging a statute basically similar to the one herein involved. In the latter case, a three-judge District Court in Connecticut after trial dismissed a complaint challenging the constitutionality of the use of Federal funds to finance construction at sectarian institutions of higher education. While both of these cases require consideration of the meaning and applicability of the Establishment and Free Exercise Clauses of the First Amendment to governmental support of sectarian educational institutions, the *Tilton* case deals with higher education and the *Lemon* case was decided on the pleadings without the benefit of a trial record.

In *W. E. DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1968), the Court expressed reluctance to decide "important and difficult constitutional issues . . . devoid of factual context." In *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the Court likewise expressed dissatisfaction with determining

serious constitutional issues in the absence of a factual record.

The present case was decided on the basis of an adequate trial and factual determinations by the trial court. It therefore presents a more appropriate case for determination of the issues than the *Lemon* case.

There is of course no question that the issues raised in this case are substantial and of national importance.

Accordingly, the Appellees suggest that probable jurisdiction be noted in this case and that the case be set down for oral argument together with the *Lemon* and *Tilton* cases.

Respectfully submitted,

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August, 1970

[illegible]

No. [illegible]

JOHN R. EARLEY, WILLIAM A. HANSON, [illegible] RALPH F. MCELROY, ALAN E. [illegible] SHEALEY, PHYLLIS A. WALTER, [illegible] CUMMERSKEY, and CORNELIUS A. CUMMERSKEY, [illegible]

Appellants

v.

JOAN DICENSO, DONALD R. HILL, ANN CLARKSON, [illegible] CHASE, HELEN KING, and MARIE [illegible]

Appellees

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. McELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,
Appellants,

v.

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,
Appellees.

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Rhode Island is reported at 316 F.Supp. 112 (1970). It is reprinted in full starting at page 28 of the Joint Appendix (J.A.).

JURISDICTION

The District Court entered judgment in this case on June 17, 1970. J.A. 50-51. The appellants filed Notice of Appeal with the District Court on June 26, 1970. J.A. 53-54. This Court noted probable jurisdiction on November 9, 1970. —— U.S. ——. The jurisdiction of this Court to hear this case on direct appeal rests on 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

This appeal draws in question the constitutionality of a Rhode Island statute entitled "An Act Providing Salary Supplements to Nonpublic School Teachers," R.I. Gen. Laws chap. 16-51 (referred to hereinafter as

the Salary Supplement Act). The text of the challenged statute was placed in evidence by the appellees as Exhibit No. 7 and is reprinted at J.A. 182.

QUESTION PRESENTED

The sole question presented by this appeal is whether Rhode Island's Salary Supplement Act, which provides supplements from state funds to the salaries of nonpublic school teachers, violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, because teachers in religiously affiliated schools are eligible for and receive benefits from that statute.

STATEMENT OF THE CASE

A. THE CHALLENGED STATUTE

The Rhode Island Constitution imposes upon the General Assembly of that State

> "the duty . . . to promote public schools *and* to adopt all means which they [the General Assembly] deem necessary and proper to secure to the people the advantages and opportunities of education." R.I. Const. art. XII, § 1. (Emphasis added.)

Mindful of that constitutional mandate and of the State's long-standing policy "to provide a quality education for all Rhode Island youth,"[1] the General Assembly in 1969 enacted the Salary Supplement Act to appropriate State funds for the payment of a 15 per cent supplement to the salaries of eligible teachers in nonpublic elementary schools. The Act, however, was more than the fulfillment of a solemn obligation.

[1] See R.I. Gen. Laws § 16-7-15.

It was an urgent response to a deepening crisis in the quality of education in the State's nonpublic schools.

The dimensions of that crisis are apparent in the express legislative findings in the statute.[2] The Act notes that 45,000 children attend nonpublic elementary schools in Rhode Island and that those children "constitute about 25% of the total school population at these age levels." R.I. Gen. Laws § 16-51-1. Because of the significant number of children educated by nonpublic schools, the General Assembly recognized that the plight of nonpublic schools was a matter of genuine public concern. The General Assembly traced the roots of the educational crisis facing nonpublic schools to the increasing inability of those institutions to keep pace with accelerating costs. Nonpublic schools were finding it difficult to maintain salary scales that would attract and retain competent teachers, and "teachers are the prime factor in educational quality." R.I. Gen. Laws § 16-51-1.[3]

The Salary Supplement Act was the General Assembly's answer to the crisis. The express purpose of

[2] The District Court found that "[t]he evidence introduced at trial fully corroborates the legislature's finding of a financial crisis in nonpublic education . . . ." J.A. 32.

[3] The testimony at trial showed that the Roman Catholic elementary schools in Rhode Island had been experiencing particular difficulties in obtaining qualified teachers because of their financial problems. J.A. 65, 88-89. The problems of those schools have been accentuated by the loss of nuns and the need to replace the nuns by lay teachers, who require considerably higher salaries. *Id.* The financial problems of Rhode Island's religiously affiliated nonpublic schools are only a microcosm of a nationwide crisis. The scope of that crisis is set out in some detail in the Brief for The National Catholic Educational Association, *et al.*, *Amicus Curiae*, pp. 14-17, *Lemon* v. *Kurtzman*, No. 89, October Term, 1970.

the Act is to permit nonpublic schools "to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." R.I. Gen. Laws § 16-51-1. That solution was in no sense novel. For the General Assembly previously had provided a similar form of State assistance to public schools, which are supported primarily out of local tax funds. See J.A. 37, n. 7.

Only teachers in "nonpublic schools," as that term is defined by the Act, are eligible for salary supplement payments. The statute defines a "nonpublic school" as one which is not operated for profit, which is capable of permitting its students to fulfill the requirements of Rhode Island's compulsory school attendance law,[4] and which has an annual per pupil expenditure for secular education that does not equal or exceed the average per pupil expenditure in the State's public schools. R.I. Gen. Laws § 16-51-2.

A teacher in a nonpublic school satisfying that definition will be eligible for the salary supplement if he or she meets the additional qualifications imposed by section 3 of the statute. Briefly stated, those additional requirements are that a teacher teach only those subjects which are required to be taught by State law or which are actually taught in public schools, that the teacher be certified by the State Department of Education, that the teacher's salary meet the minimum salary requirements of State law for public school teachers,[5] that the teacher use only teaching materials in use in the public schools, and that the teacher not

[4] R.I. Gen. Laws § 16-19-2; see also R.I. Gen. Laws § 16-22-2.

[5] See R.I. Gen Laws § 16-7-29.

teach a course in religion while receiving a salary supplement from the State. R.I. Gen. Laws § 16-51-3.

The statute also limits participation in its benefits to those teachers whose total salaries, including the 15 per cent supplement, do not exceed the average maximum salary paid to public school teachers in the State. R.I. Gen. Laws § 16-51-4. Participating teachers must apply directly to the Commissioner of Education for the supplement, R.I. Gen. Laws § 16-51-3; the supplement must be paid directly to the teacher and "not through the agency of the nonpublic school in which the teacher is employed." R.I. Gen. Laws § 16-51-5. The State Department of Education is authorized to audit the books of nonpublic schools for the limited purpose of assuring that participating teachers are being paid at least the prescribed minimum salary. R.I. Gen. Laws § 16-51-5. For the first year of its operation, the General Assembly appropriated $375,000 to implement the salary supplement program.

B. THE PROCEEDINGS BELOW

The appellees, six individuals asserting the status of state taxpayers, filed a complaint with the United States District Court for the District of Rhode Island on December 16, 1969, challenging the constitutionality of the Salary Supplement Act under the Establishment and Free Exercise Clauses of the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The essential constitutional defect alleged by the appellees was that the challenged statute "provides for direct financial aid out of state funds which support sectarian schools." Complaint ¶ 20, J.A. 8, 20. The named defendants were the State officials responsible for implementing

the statute. On February 11, 1970, the District Court granted a motion to intervene on behalf of the defendants filed by the appellants—seven teachers in Roman Catholic elementary schools, who had qualified for salary supplement payments, and two parents who had children attending Roman Catholic elementary schools.

A three-judge court was convened, as requested by the appellees in their complaint, and that court received evidence and heard arguments at a two-day trial. The evidence consisted of several documents and depositions and the testimony of nine witnesses.[6] The bulk of the evidence presented by the parties reflected their divergent views of the applicable legal principles. The appellees argued that the Establishment Clause bars all public financial assistance to religious or "sectarian" institutions, and their evidence emphasized the so-called "religious atmosphere" existing in parochial schools that benefit from the Salary Supplement Act. The appellants contended that government can constitutionally subsidize the secular educational functions performed by church-related schools and stressed in their evidence that teachers receiving salary supplement payments were engaged in solely secular educational activities.[7]

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[6] The witnesses who testified at trial were Edward F. Wilcox, who supervises the administration of the Salary Supplement Act; Rev. Edward W. K. Mullen, Superintendent of Schools for the Roman Catholic Diocese of Providence; and the seven teachers who are appellants in this case. Appellees also placed in evidence the depositions of two other parochial school teachers who had qualified for salary supplement payments.

[7] Consistent with their view of the controlling constitutional principles, the appellants objected to all evidence offered by the appellees to show a so-called "religious atmosphere" in parochial schools.

On June 15, 1970, after receiving post-trial briefs, the District Court filed its opinion holding that the Salary Supplement Act contravened the Establishment Clause of the First Amendment. Judge Pettine entered a separate opinion, concurring in part and dissenting in part. The District Court entered its judgment two days later and, after denying applications for a stay of its injunction pending direct appeal to this Court, the court below permanently enjoined the statute's operation. On June 26, 1970, the appellants presented an application to Mr. Justice Brennan, Circuit Justice for the First Circuit, for a stay of the permanent injunction until this Court could consider and decide the appeal. Mr. Justice Brennan referred the application to the entire Court and, on June 27, 1970, the Court granted the stay, with Mr. Justice Douglas dissenting and Mr. Justice White and Mr. Justice Marshall taking no part in the consideration of the application. 399 U.S. 918 (1970).

C. THE DISTRICT COURT'S OPINION

The District Court did not enter separate findings of fact and conclusions of law. Consequently, its opinion is the sole source of the facts it deemed relevant to the legal issues in the litigation. And those facts reflect the two divergent lines of evidence presented by the parties.

The District Court found that the evidence presented at trial concerning Roman Catholic elementary schools [8]

[8] There are two explanations for the emphasis at trial and in the District Court's opinion on those nonpublic schools that are affiliated with the Roman Catholic Church. First, 95 per cent of all Rhode Island children enrolled in nonpublic schools attend Roman Catholic parochial schools. J.A. 32. Secondly, to date, only teachers in Roman Catholic parochial schools have applied for benefits under the Salary Supplement Act. *Id.*

fully corroborated the General Assembly's findings that nonpublic schools in the State were having great difficulty maintaining their educational quality because of the rapidly accelerating cost of teachers' salaries. J.A. 32. However, despite the legislature's concern for the financial plight of nonpublic schools, the District Court also found that the challenged statute would not relieve Roman Catholic parishes which support parochial schools of their escalating financial burdens. Those parishes will continue to spend increasing amounts of their own funds in their quest for educational quality, and the Salary Supplement Act will simply permit parochial schools to obtain better qualified teachers. J.A. 32.

The District Court noted that parochial schools "possess a number of distinctively religious attributes which distinguish them from public schools." J.A. 35. Among those "religious attributes" are the proximity of parochial schools to the parish church, religious symbolism on and within the school building, the teaching of a course in religion and certain other religiously oriented activities.[9] The District Court also found a concern for religious values in a Diocesan Handbook of School Regulations, which appellees placed in evidence over strenuous objections.[10] The Handbook purports to be a set of guidelines for parochial school principals, although the District Court noted that not all of its provisions have full force and effect. J.A. 34. On the basis of those facts, the District Court concluded that the Roman Catholic Church "gains special ad-

[9] The "religious attributes" listed by the District Court in its opinion, J.A. 35-36, were, in effect, a summary of the evidence offered by the appellees to show that a "religious atmosphere" existed in Roman Catholic parochial schools.

[10] Plaintiffs' Exhibit No. 14, J.A. 191.

vantage from a curriculum which contains both religious and secular subjects," and that "the diocesan school system is an integral part of the religious mission of the Catholic Church." J.A. 36."

The District Court also found, however, that the religious attributes of parochial schools and their concern for religious values "[do] not necessarily affect the content of secular subjects in diocesan schools." J.A. 35. The District Court noted that all teachers who testified at trial stated that they did not inject religion into their secular courses and that "[t]his testimony gains added credibility from the fact that several of the teachers were non-Catholics." J.A. 35. The District Court also pointed out that teachers qualifying for salary supplements were required to use only those teaching materials approved for use in the public schools.

The District Court's review of the evidence concluded with the following statement:

> "These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise." J.A. 37.

[11] Strictly speaking, the conclusions quoted above from the District Court's opinion cannot be considered findings of fact, since the record of this case contains no competent evidence to show why the Roman Catholic Church supports and maintains elementary schools or what role those schools play in the religious mission of the Roman Catholic Church. However, this Court has already indicated that those considerations are irrelevant to the question of whether the state can constitutionally spend its funds to aid the secular educational process in religiously affiliated schools. See *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970).

The District Court began its Establishment Clause analysis by purporting to apply the "purpose and primary effect" test first articulated by this Court in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963), and subsequently applied to the issue of public financial assistance to church-related education in *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968).[12] The District Court had little trouble holding that, in light of the Salary Supplement Act's express statement of purpose, R.I. Gen. Laws § 16-51-1, the challenged statute had the secular purpose demanded by the *Allen* test. However, the *Allen* requirement of a primary secular effect caused the District Court greater problems.

Having found that the Salary Supplement Act had generated two significant effects—one clearly secular and the other characterized as religious—the District Court declined to engage in further analysis to determine which effect should be considered "primary"

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[12] The District Court quickly and correctly disposed of two legal arguments made by the appellees. First, the District Court ruled that the appellees' separate claim based on the Free Exercise Clause of the First Amendment failed for lack of proof. J.A. 37-38. Secondly, the District Court rejected the appellees' Establishment Clause argument based on the following language from *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Appellees contended that language imposed an absolute prohibition on all public aid to religious institutions. The District Court properly noted that any such reading of *Everson* was belied by its holding. See also *Walz* v. *Tax Commission*, 397 U.S. 664, 670-71 (1970).

within the meaning of the *Allen* test.[13] Rather, the District Court read this Court's more recent decision in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), as refining the *Allen* test of primary effect and directing the inquiry solely to whether the challenged spending program results in "excessive entanglements" between government and religious institutions. The District Court concluded that the Salary Supplement Act had produced such impermissible entanglements and therefore had an effect proscribed by the Establishment Clause. The District Court also expressed concern that efforts by religiously affiliated schools to qualify their teachers for salary supplement payments could limit the internal freedom of those schools to order their curricula.

In a separate opinion, Judge Pettine concurred with the majority's conclusion that the Salary Supplement Act would lead to excessive entanglement between government and religion. But he dissented from the majority's ruling that the statute had the effect of providing substantial support to a religious enterprise. Relying specifically on this Court's recognition in *Allen* that parochial schools perform the distinct functions of secular education and religious instruction, 392

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[13] In so ruling, the District Court specifically rejected the appellants' argument that the *Allen* decision requires that the primary effect be measured by reference to the educational function beign subsidized by the public funds. Under that analysis, a challenged statute will have the necessary primary secular effect if funds appropriated under the statute support only secular educational functions of religiously affiliated schools. A three-judge district court in Connecticut applied that precise test in sustaining th econstitutionality of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58, in the face of an Establishment Clause challenge. *Tilton* v. *Finch*, 312 F.Supp. 1191 (D.Conn.), *prob. juris. noted*, 399 U.S. 904 (1970).

U.S. at 245-48, Judge Pettine asserted that state support for the secular educational functions of parochial schools could not be considered support for a religious enterprise unless there was proof that the secular teaching in those schools is permeated by religion. Judge Pettine found the record in this case barren of any such proof of permeation.[14]

SUMMARY OF ARGUMENT

The District Court's ruling that the Salary Supplement Act contravenes the Establishment Clause is clearly at war with the governing constitutional principles laid down by this Court's decisions. The fundamental error made by the District Court was to apply the recent decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), in a manner that would invalidate any significant governmental program to improve the quality of secular education in nonpublic schools with religious affiliations. In so ruling, the District Court necessarily disregarded this Court's repeated affirmation that the central concern of the Establishment Clause is that government be neutral in matters touching upon religion.

This Court's decisions have discussed the Establishment Clause in terms of separation of church and state but have recognized that absolute separation is neither practical nor required. The problem is inevitably one of degree, and the degree of separation demanded is defined by the requirement of govern-

[14] Even the majority found no proof of permeation. At most, the majority found a religious atmosphere existing in Rhode Island parochial schools. But it also was careful to point out that the so-called religious atmosphere did not affect the teaching of secular subjects in those schools. J.A. 35, 36.

ment neutrality. The principle of neutrality at once acknowledges the inevitability of contacts and interaction between government and religion in modern society and serves to reconcile the overlapping, and occasionally competing, dictates of the Establishment and Free Exercise Clauses of the First Amendment.

The requirement that government be neutral in its dealings with religion or religious institutions is fully implemented by the purpose and primary effect test enunciated in *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963), and subsequently applied in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), to the precise question of public financial assistance to church-related education. Under that test, a statute will survive Establishment Clause scrutiny if it has a secular purpose and a primary effect that neither advances nor inhibits religion. A statute having such a purpose and primary effect will not fall simply because religiously affiliated institutions derive tangible benefits from it.

The decisions in *Allen* and *Walz* provide precise guidance for applying the purpose and primary effect test to public spending programs for education which benefit religiously affiliated schools. A statute's purpose is to be adjudged according to any statement of legislative purpose it contains, and a statute's effects are to be evaluated according to their relationship to the stated purpose. The principal focus of the primary effect inquiry is the nature of the educational functions supported by public funds—not the religious or non-religious nature of schools benefiting from those funds. If the government supports only the secular educational functions of religiously affiliated schools, the statute will not have a primary effect of *ad-*

vancing religion. And if the statute's administrative scheme does not produce excessive or impermissible involvement with religion, the spending program will not have a primary effect of *inhibiting* religion.

Those governing constitutional principles lead inescapably to the conclusion that the Salary Supplement Act is in harmony with the Establishment Clause. The stated purpose—to improve the quality of secular education in Rhode Island's nonpublic schools—is demonstrably secular. Payments made under the Act go only to those teachers in religiously affiliated schools engaged in solely secular teaching activities. The principal administrative relationships created by the Act are between State officials and individual teachers, and the involvement between government and religious institutions is, at most, minimal. And those administrative relationships are carefully tailored to assure a proper and constitutional use of public funds and to avoid any government involvement in the religious functions of church-related nonpublic schools. Consequently, the Salary Supplement Act has a secular purpose and a primary effect that neither advances nor inhibits religion.

The District Court's contrary conclusion resulted from its failure to adhere to the governing Establishment Clause principles. First, the District Court labeled two of the statute's effects as "significant" and declined to engage in the required further analysis to determine which of those effects was "primary" for Establishment Clause purposes. Second, the District Court viewed the minimal involvements between the State and religiously affiliated schools under the Act as constitutionally disabling while ignoring the already substantial and legally necessary involvement

existing between the State and those schools apart from this statute.

The appellees' principal Establishment Clause argument in the court below was premised on a single sentence in *Everson* v. *Board of Education*, 330 U.S. 1 (1947). But, as the *Walz* decision illustrates, the *Everson* language relied on by the appellees was not intended by this Court as a definitive and final test of Establishment Clause limitations on government power. The appellees also contended that the challenged statute provides direct financial assistance to churches. But, as the evidence in this case demonstrates, that argument is premised not on the consequences of the statute's operation but on the consequences that would flow if appellees are successful in enjoining the operation of the Act in this litigation. Finally, the appellees relied on a single and suspect piece of evidence to argue that secular teaching in parochial schools is permeated by religion. Far more credible evidence, however, convincingly refutes that contention.

The appellees also alleged that the Salary Supplement Act violated the Free Exercise Clause because it amounted to "compulsory taxation for the support of religion or religious institutions." The District Court, however, properly ruled that the appellees had failed to present the proof necessary to support such a constitutional claim.

ARGUMENT

I.

ESTABLISHMENT CLAUSE ISSUE

The fundamental error made by the court below was to apply the decision in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), in a manner that imposes a virtual constitutional bar to all public financial assistance to the secular aspects of church-related education. The District Court did not expressly state that rule in its *Walz* analysis. But its view of the "excessive entanglement" doctrine, if sustained by this Court, would necessarily produce that result. For the District Court construed any entanglement or involvement between government and religiously affiliated schools arising from a public assistance program as per se prohibited by the Establishment Clause. In so ruling, the court below disregarded this Court's admonition that the test of entanglement "is inescapably one of degree." 397 U.S. at 674. *Walz* speaks of permissible contacts and impermissible involvements. But the court below viewed every contact as an involvement and two or three contacts as excessive entanglement.

The strong approval voiced in *Walz* of the decisions in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Everson* v. *Board of Education*, 330 U.S. 1 (1947), demonstrates that the *Walz* doctrine does not forbid all contacts between government and religiously affiliated schools that arise in educational assistance programs. The entanglement concept seeks to safeguard the primary constitutional value of religious neutrality. Any application of the doctrine that violates that value stands self-condemned. The practical result of the District Court's decision is to preclude Rhode Island

from adopting any significant program of assistance to the secular education of children attending religiously affiliated schools. Such a result is hostile —not neutral—toward the right of parents to choose such schools, the right of teachers to teach in them, and the right of the state to provide, by mandate and assistance, for the secular education of all its children.

The errors of the District Court's decision become more manifest when set against the principles which have emerged from this Court's other Establishment Clause decisions. This brief will summarize those principles and demonstrate that they compel the conclusion that the Salary Supplement Act passes constitutional muster. This brief will also expose the improper application of those principles to the facts of this case by the District Court and answer some of the appellees' arguments which are at war both with the governing constitutional standards and a proper application of those standards.

A. GOVERNING CONSTITUTIONAL PRINCIPLES

In its most recent examination of the limitations imposed by the religion clauses of the First Amendment on governmental power, this Court observed:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970).

The terse language of the Establishment Clause provides scant guidance for its application to specific governmental actions. However, in several leading de-

cisions over the past 23 years, this Court has sketched in the contours of the Establishment Clause's restrictions on governmental power. To give form and substance to the Establishment Clause, those decisions have looked to the historical context in which the First Amendment was adopted and the modern societal values protected by the no-establishment guarantee.

The controlling constitutional standard has not emerged full-blown from any single decision of this Court. Rather, the test has evolved gradually as the Court has been required to apply the Establishment Clause prohibition to differing factual situations. Significantly, most of the leading decisions on this constitutional issue have involved the related problems of religion in the public schools[15] and public financial assistance to church-related education.[16] It is to that course of decisions that the Court must now look to resolve the constitutional questions raised by this appeal.

1. Requirement of Government Neutrality

This Court has consistently recognized that, in Establishment Clause cases, the "constitutional standard is the separation of Church and State." *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968). However, the Court has also stressed that the Establishment Clause "does not say that in every and all respects

[15] *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); see also *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

[16] *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

there shall be a separation of Church and State." *Zorach* v. *Clauson*, *supra*, at 312; see *Walz* v. *Tax Commission*, 397 U.S. 664, 670 (1970). "The problem, like many problems in constitutional law, is one of degree," *Zorach* v. *Clauson*, *supra*, at 314; *Board of Education* v. *Allen*, *supra*, at 242, and the degree of separation demanded is defined by the requirement that government be neutral in matters touching upon the religious affairs of its people."

The principle of neutrality recognizes that there will inevitably be interaction between government and religious institutions in modern society, as this Court recently acknowledged in *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970). For example, almost 50 years ago this Court ruled that a state could not constitutionally deny private schools, including those with religious affiliations, the right to exist. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). At the same time, however, the Court conceded the states' power to regulate such religiously affiliated schools closely to assure that they provide an education meeting minimum state standards of quality. 268 U.S. at 534; see also *Board of Education* v. *Allen*, 392 U.S. 236, 245-47 (1968). Such schools must also comply with government health and safety regulations, and the government makes available to those schools services, such as fire and police protection, sewage disposal, and public streets and highways, which are available to the public generally. See *Everson* v. *Board of Education*, 330 U.S. 1, 17-18 (1947); *Walz* v. *Tax*

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[17] See, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664, 669-70 (1970); *Board of Education* v. *Allen*, 392 U.S. 236, 242 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 226 (1963); *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952); *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

Commission, 397 U.S. 664, 667 (1970). And, in some instances, government has chosen to work through established private social welfare agencies, including those with religious affiliations, to achieve its public welfare goals. See, *e.g.*, *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).

In light of these substantial and inevitable contacts between government and religious institutions in today's society, the principle of neutrality assures a course of governmental conduct that neither advances nor inhibits religion while permitting religiously oriented activities to co-exist in the secular world with state-sponsored welfare activities. The principle of neutrality also serves to reconcile the dictates of the Establishment Clause with the overlapping, and occasionally competing, commands of the Free Exercise Clause of the First Amendment. This Court recently observed:

> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz* v. *Tax Commission*, 397 U.S. 664, 668-69 (1970).[18]

Only the principle of neutrality can minimize the potential conflicts between the two religion clauses and promote the goal of religious liberty which both clauses seek to implement.

The neutrality demanded of government by the Establishment Clause has been expressed in somewhat different language by the Court, but the limitations imposed on government power by the command of

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[18] See also *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963); *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947).

neutrality are not in dispute. Governmental actions must be such that "no religion be sponsored, none commanded, and none prohibited." *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970). Government can take no action that either advances or inhibits religion. *Board of Education* v. *Allen*, 392 U.S. 236, 242-43 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963).

> "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970).

2. The Constitutional Test

From this Court's several Establishment Clause decisions, there has emerged a precise test for evaluating the constitutional validity of the interaction between government and religion in the realm of education. It is a test which fully implements the principle of neutrality and which places well-defined limitations on governmental power. It prohibits government from supporting religious formation in the schools of the Nation, public or nonpublic. But it places no limitations on the power of government to support and sponsor secular education in every secularly qualified school, public or nonpublic. The test was first fully articulated in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963), as follows:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Consti-

> tution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

That precise test, however, had been applied by this Court two years earlier in *McGowan* v. *Maryland*, 366 U.S. 420, 445 (1961), and *Torcaso* v. *Watkins*, 367 U.S. 488, 489-90 (1961),[19] and that test has been controlling in all of the Establishment Clause cases decided by this Court subsequent to *Schempp*. See *Board of Education* v. *Allen*, 392 U.S. 236, 243-44 (1968);[20] *Epperson* v. *Arkansas*, 393 U.S. 97, 106-09 (1968); *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970).

Of the several cases that have applied the "purpose and primary effect" test, the decision in *Allen* is most directly relevant to the issues in this appeal. The *Allen* case, like this appeal, involved the Establishment Clause validity of a public aid program that benefited religiously affiliated schools. At issue in *Allen* was a New York statute that required local school boards to loan secular textbooks without charge to pupils in grades seven through twelve in both public and private schools, including those with religious affiliations. The express ruling of this Court was that

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[19] Although the "purpose and primary effect" test was not employed in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), this Court has subsequently commented that "[t]he statute upheld in *Everson* would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.'" *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); see also *McGowan* v. *Maryland*, 366 U.S. 420, 442-44 (1961).

[20] The *Allen* decision not only applied the purpose and primary effect test but also quoted the *Schempp* formulation of that test verbatim. 392 U.S. at 243.

the textbook loan program, in both its purpose and primary effect, neither advanced nor inhibited religion. 392 U.S. at 243-44. That *Allen*, in both its rationale and result, was consistent with Establishment Clause doctrine was confirmed by the majority in *Walz*, which said of the *Allen* decision: "In so holding the Court was heeding both its own prior decisions and our religious tradition." 397 U.S. at 672.

Consequently, as the court below recognized,[21] the purpose and primary effect test, as enunciated in both *Schempp* and *Allen*, is the constitutional standard that governs the Establishment Clause issue in this litigation. It is a test which assures that government will maintain its required posture of neutrality in its educational programs. It is a test which has emerged gradually but definitively as this Court has been required to apply the no-establishment guarantee to differing factual situations. And it is the test that this Court has applied to the precise question of whether the Establishment Clause prohibits the government from including religiously affiliated schools in spending programs designed to improve secular educational quality.

3. Benefits to Religion

A challenged statute will not run afoul of the Establishment Clause merely because religion or religiously affiliated institutions happen to derive benefit or suffer detriment from it. That principle is a necessary corollary of the purpose and primary effect test, and found perhaps its fullest expression in the Sunday Closing Law cases.[22] Any test predicated upon the

[21] See J.A. 39.

[22] See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 442-45 (1961).

existence of a *primary* effect necessarily presupposes that the governmental program in question has generated a number of effects. What the primary effect requirement demands is that a serious, substantial public benefit result from the legislation, a benefit that, in itself, neither advances nor inhibits religion. The statute must be religiously neutral, not in the sense that it has no religious effects, but in the sense that those effects are collateral or incidental to the statutory scheme and not inherent in it. Once that requirement is satisfied, the challenged program will be consistent with the Establishment Clause's requirement of religious neutrality, even though the statute has the incidental effect of conferring certain tangible benefits or imposing detriments on religion or religiously affiliated institutions.

Thus, in *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947), the Court upheld New Jersey's bus transportation program even though it recognized that "children are helped to get to church schools" and that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." Similarly, in *Board of Education* v. *Allen*, 392 U.S. 236, 244 (1968), the Court acknowledged that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school." [23] Surely a religiously affiliated school benefits and becomes a more viable institution when more children attend it as the result of a public spending program. See *Walz* v.

[23] In fact, when the Court cited the result in *Allen* with approval in *Walz* v. *Tax Commission*, 397 U.S. 664, 671-72 (1970), it did so despite its statement that the textbook loan law relieved churches sponsoring schools "of an enormous aggregate cost for those books."

Tax Commission, 397 U.S. 664, 670-72 (1970). But, as the Court observed in *Allen,* such an effect "does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244. Such an effect will not make the spending program constitutionally infirm as long as the program generates the required primary secular and religiously neutral effect.

When, as here, a governmental spending program for the improvement of education, health or the general welfare is attacked on Establishment Clause grounds, the incidental benefit corollary to the purpose and primary effect test simply recognizes the realities of our social order and implements the principle of neutrality. Such governmental programs typically seek to draw upon the experience and resources of all public and private agencies to achieve the program's goals. Because of the prominent role traditionally played by church-related organizations in public welfare work,[24] the exclusion of such organizations from programs designed to improve and expand welfare services would tend to frustrate the achievement of important and legitimate secular goals.[25] Such an exclusion could also properly be viewed as government hostility to religion.[26]

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[24] See D. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 513-516 (1968); W. Stanmeyer, *Free Exercise and the Wall: Obsolescence of a Metaphor,* 37 Geo. Wash. L. Rev. 223, 225-28 (1968).

[25] See *Lemon* v. *Kurtzman,* 310 F.Supp. 35, 47 (E.D.Pa. 1969), *prob. juris. noted,* 397 U.S. 1034 (1970).

[26] Government hostility toward religion is plainly forbidden by the Establishment Clause. See *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952); *McCollum* v. *Board of Education,* 333 U.S. 203, 211-12 (1948).

To be sure, religiously affiliated organizations benefit from their participation in public welfare spending programs if, as a result, they are better able to provide various welfare services, such as a better education in the sciences. But, under the incidental benefit corollary, that fact is not decisive in resolving an Establishment Clause challenge to such programs. The central inquiry, and the focus mandated by the purpose and primary effect test, is whether a primary effect of the expenditures is the achievement of the program's legitimate secular goals.

4. The Purpose and Primary Effect Analysis

The remaining problem is the basis for determining whether a challenged statute has a secular purpose and a primary effect that neither advances nor inhibits religion. The Salary Supplement Act is alleged to be constitutionally defective because the General Assembly, in seeking to improve the quality of secular education in Rhode Island's nonpublic schools, extended the statute's benefits to teachers in religiously affiliated schools. This Court's decisions in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), provide precise guidance for applying the purpose and primary effect test to such a public aid program.

The secular purpose inquiry under the governing test presents little difficulty when the contested statute contains an express statement of legislative purpose that is clearly within the secular competence of the state. *Allen* makes that statement of purpose controlling. For example, the Court noted that New York's textbook loan law was based on legislative "findings that the 'public welfare and safety require

that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.'" 392 U.S. at 239. Then, after reciting the purpose and primary effect test as the controlling constitutional standard, the Court declared:

> "The express purpose of [the challenged statute] was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its *stated purpose.*" 392 U.S. at 243. (Emphasis added.)

The *Allen* decision did not fashion new law in focusing the inquiry on the statute's statement of purpose. For it has long been the rule that "the specific statement of primary purpose in the act governs." *Arizona* v. *California*, 283 U.S. 423, 456 (1931).

The primary neutral effect inquiry is more complex because a legislative enactment will invariably produce a multiplicity of effects, some of which are clearly secular and some of which may be characterized as religious. For example, the court below identified two "significant" effects flowing from the Salary Supplement Act: the improvement of the quality of secular education in Rhode Island's Roman Catholic parochial schools, and aid to religious enterprises. J.A. 37. But the District Court treated those two effects in a manner that is wholly inconsistent with the controlling principles enunciated by this Court in *Schempp, Allen* and *Walz*.

Two essential questions must be answered in the primary effect analysis. First, what is the basis for determining which of the statute's effects is "pri-

mary"? Second, when the primary effect has been identified, what is the basis for determining whether it is religiously neutral, neither advancing nor inhibiting religion? The original parameters of the primary effect inquiry were defined by the *Schempp* and *Allen* decisions. The *Walz* decision subsequently added an important dimension to the *Schempp-Allen* inquiry. The essential error of the District Court was in reading *Walz* as superseding, rather than reinforcing, the *Schempp-Allen* primary effect requirements.

The *Allen* and *Walz* decisions provide the principal guidance for adjudging the primary effect of a program of public assistance to improve the quality of secular education. *Allen* establishes the basis for determining whether the primary effect of such a program is to *advance* religion, and *Walz* sets forth the criteria for determining whether the primary effect is to *inhibit* religion. Under *Allen,* the primary effect advances religion only if the public funds subsidize religious instruction or instructional materials. Under *Walz,* the primary effect inhibits religion if the execution of the statutory program results in an "excessive entanglement" of the government in religious affairs.

a. Primary Effect

The major concern of the "primary effect" test, as *Schempp* and *Allen* make clear, is that government not use a religious means to achieve a clearly valid secular end. In *Schempp,* devotional exercises in the public schools were defended on the ground that they contributed to the formation of good citizens. The Court rejected that argument, ruling that the Establishment Clause prohibits the government from making religion an engine of civil policy. 374 U.S. at 223-27. In *Allen,*

however, the Court found it consistent with the Establishment Clause for the state to employ the secular instrument of secular textbooks to further the secular education of all school children, irrespective of where they attend school.

Neither the *Schempp* nor *Allen* decisions discussed the relative importance of the secular and religious effects involved in those cases. But no such discussion was necessary because it was clear in *Schempp* that the means were religious and in *Allen* that the means were secular. However, when, as in this case, a court identifies two important or significant effects—one secular and one religious—the *Allen* decision provides the standard for determining which of those two effects is to be considered "primary" for Establishment Clause purposes. In *Allen*, the Court stressed that there was "nothing about the necessary effects of the statute that is contrary to its stated purpose." 392 U.S. at 243. The Court was clearly concerned with whether the challenged statute had produced an effect which was consistent with and which implemented its stated purposes. If there is such an effect, it will be viewed as "primary" in the application of the purpose and primary effect test. Consequently, in the search for a statute's primary effect, the several effects generated by the enactment are to be evaluated according to their relationship to its purpose. The effect intended by the legislature is primary.

It may be true, as one District Court recently observed, that "[t]he 'primary effect' of legislation . . . is not always precisely that which its authors optimistically predict in their statements of purpose." *Johnson* v. *Sanders*, 39 U.S.L.W. 2225 (D. Conn., decided October 14, 1970). But when a statute produces the

precise effect envisioned by the legislature and, more importantly, when that effect is the furtherance of the statute's secular goals, Establishment Clause limitations on legislative power have been fully satisfied.

That important principle comports with reason and logic. When the legislature acts to improve the quality of secular education, the judicial inquiry should be directed to whether the statute, in its operative effect, achieves that goal. Any such effect is necessarily the primary impact of the legislation. To focus on the fact that religiously affiliated schools happen to derive benefits from such legislation is to emphasize an effect that has consistently been considered only incidental to central Establishment Clause concerns. For, from *Everson* through *Walz*, this Court has repeatedly ruled that an otherwise valid enactment will not be struck down on Establishment Clause grounds simply because religion or religiously affiliated institutions benefit or suffer incidentally from the enactment.

b. . . . That Neither Advances Religion

A critical aspect of the inquiry whether the primary effect of a statute advances religion is whether that question is to be resolved by examining the secular or non-secular use made of the public funds or, instead, by examining the secular or non-secular character of institutions benefiting from those funds. The *Allen* decision makes it clear that it is the use made of the funds—and not the nature of the institutions—that controls. See also *Tilton* v. *Finch*, 312 F. Supp. 1191, 1198 (D. Conn.), *prob. juris. noted*, 399 U.S. 904 (1970).

The Court in *Allen* placed substantial reliance on its earlier decision in *Everson* in upholding the New York statute. The appellants in *Allen* argued quite force-

fully that *Everson* could not control because free bus rides are constitutionally distinguishable from free textbooks. The basis for the proffered distinction was that textbooks, unlike bus transportation, aid the educational process and that "[t]here is no such thing as secular education in a sectarian elementary or secondary school. The whole curriculum is permeated by religion." Brief for Appellants, p. 16, *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The Court rejected that argument, finding it unsupported by the record in the case and at odds with its prior decisions.

The Court's review of those prior decisions began with the assertion that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education," 392 U.S. at 245; see also *Everson* v. *Board of Education,* 330 U.S. 1, 3 (1947), and concluded with this statement:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 247-48.

The New York act was sustained because it authorized only the lending of secular textbooks to students, whether they attended public or religiously affiliated

schools. 392 U.S. at 244-45. And the Court stressed that the textbook loan law did not result in "unconstitutional involvement of the state with religious instruction." 392 U.S. at 248.

Thus, the secular-religious dichotomy in the functions performed by religiously affiliated schools and the limitation of public assistance to the secular function was the precise focus of the primary effect analysis in *Allen*. The contested statute was sustained *because* it subsidized only the secular educational functions of religiously affiliated schools and did not aid the religious functions of those schools. That test of primary effect is wholly consistent with this Court's prior Establishment Clause decisions. In *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), the Court invalidated Illinois' "released time" program because tax-supported property was subsidizing religious instruction. *Cf. Zorach* v. *Clauson*, 343 U.S. 306, 308-09 (1952). But, in *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), the Court agreed that church-related schools could share in those public benefits which are "so separate and so indisputably marked off from the religious function" performed by those schools. *Cf. Bradfield* v. *Roberts*, 175 U.S. 291 (1899). Consequently, a public spending program that aids only the secular educational functions of religiously affiliated schools will not have the effect of advancing religion. That schools of a religious nature benefit from such enactments is not constitutionally controlling.[27]

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[27] That distinction was drawn most succinctly by the District Court in *Tilton* v. *Finch*, 312 F.Supp. 1191, 1198 (D.Conn.), *prob. juris. noted*, 399 U.S. 904 (1970), when it ruled that "[t]he focus of this test [of primary effect] as applied in *Allen* is the function secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid."

The fact that the government purports to aid only secular educational functions does not necessarily foreclose the primary effect inquiry. In *Allen,* the Court was confronted by a "meager record" containing nothing to refute the legislative and public judgment that religiously affiliated schools perform the dual functions of secular education and religious instruction. 392 U.S. at 248. The Court took pains to note that the record failed to support the allegations that all teaching in a religiously affiliated school is religious or that the secular and religious educational processes are necesarily intertwined. "No evidence has been offered about particular schools, particular courses, particular teachers, or particular books." *Id.*

The decision in *Allen,* therefore, clearly permits those challenging particular forms of aid to church-related education to show that, in fact, the public assistance is not confined to the secular educational functions of religiously affiliated schools. The challengers would presumably prevail if they could prove that the publicly assisted secular functions of religiously affiliated schools were so permeated by religion that no meaningful distinction could be drawn between the secular and religious functions of participating schools.[28] But, absent such proof of permeat on, gov-

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[28] See W. Valente, *Aid to Church-Related Education—New Directions Without Dogma,* 55 Va. L. Rev. 579, 588-89 (1960); *cf.* J. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 291-303 (1968).

Proof of such a fusion of the secular and religious functions would stand on a far different legal footing from the unsubstantiated assertions of the appellants in *Allen* that permeation was a fact of the educational life of church-related schools. The appellants in *Allen* were, in effect, asking for a constitutional presumption of permeation. The Court rejected that presumption and firmly established the presumption of nonpermeation. But the Court did not foreclose the possibility of overcoming the presumption of nonpermeation by proof to the contrary.

ernment assistance to the secular educational functions of religiously affiliated schools is constitutionally permissible.

c. . . . Nor Inhibits Religion

The second part of the primary effect inquiry—whether a contested statute operates to inhibit religion—is governed principally by the *Walz* decision, which held that government did not violate the Establishment Clause by exempting church property from taxation. The Court in that case framed its "effect" inquiry in these terms: "We must . . . be sure that the end result—the effect—is not an excessive government entanglement with religion." 397 U.S. at 674. Although there was no issue in the *Walz* case of public financial assistance to church-related institutions, the Court, in the course of that decision, observed:

> "[A] direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." 397 U.S. at 675.

Thus, the Court apparently viewed the administrative relationships that necessarily result between government and religiously affiliated institutions in a public aid program as having the potential for the type of "entaglement" or "involvement" with which *Walz* was concerned.[29]

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[29] The *Walz* language referring to direct money subsidiaries appears in that portion of the Court's opinion which discusses the alternatives of taxing or exempting from taxation churches *qua* churches. Thus, it would appear that the direct money subsidiaries discussed by the Court referred to such subsidies to churches *qua* churches. It is not clear that the dangers of "sustained and detailed administrative relationships" would be of the same kind or quality when public money flows to religiously affiliated organizations which are not engaged in strictly religious activities.

The *Walz* decision indicates that government entanglement or involvement with religion carries the danger of government interference that could lead to inhibition of religion. The Court pointedly noted that the First Amendment "will not tolerate governmentally established religion or government interference with religion." 397 U.S. at 669. The only and obvious alternative to exempting churches from taxation was to tax them, an alternative that certainly would not have the effect of establishing religion. The alternative to taxing churches was rife, however, with the potential for government inhibition of religion through "tax valuation of church property, tax liens, tax foreclosures." 397 U.S. at 674. Indeed, the Court viewed the challenged tax exemption as a determination by New York "that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be *inhibited* in their activities by property taxation." 397 U.S. at 672. (Emphasis added.) Even more pertinent to the Court's concern for the freedom of religiously affiliated schools is the following observation made by the Court after it approved the holdings in *Allen* and *Everson:*

> "With all of the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, *we have been able to chart a course that preserved the autonomy and freedom of religious bodies* while avoiding any semblance of established religion." 397 U.S. at 672. (Emphasis added.)

Thus, the question whether a government educational program has the prohibited effect of inhibiting religion

is to be answered by applying the *Walz* test of government entanglement or involvement with religious institutions.

Walz does not bar all involvement, administrative or otherwise, between government and religious institutions. "The test is inescapably one of degree." 397 U.S. at 674. The Court recognized that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* Exemption was the preferred course of governmental conduct because it produced a "lesser" involvement. 397 U.S. at 674-75. Similarly, while recognizing that the necessary administrative relationships in government aid to the secular functions of religiously affiliated schools involved "risks," the Court did not view those relationships alone as constitutionally disabling. 397 U.S. at 672. The Establishment Clause bars only "excessive" involvements between government and religion "calling for official and continuing surveillance *leading to an impermissible degree of entanglement.*" 397 U.S. at 675. (Emphasis added.)

The problem, therefore, is to determine which involvements between government and religion are "excessive" or "impermissible." The *Allen* decision resolves that problem when the Establishment Clause issue arises in the context of public assistance to church-related education. Consistent with this Court's prior decisions, *Allen* permits public aid to the secular educational functions of religiously affiliated schools but requires that such aid be strictly limited to those secular functions. Consequently, the necessary administrative relationships flowing from such aid programs that do no more than assure that public funds

will be spent for only secular educational functions cannot be "excessive" or "impermissible." Indeed, such limited administrative relationships are probably constitutionally required to assure a proper and constitutional use of public funds.

Problems of impermissible and excessive government involvement with religion would arise if the administrative controls placed on religiously affiliated schools were broader than necessary to assure a purely secular use of public funds. The most serious of such problems would be any effort by public officials to regulate or interfere with the religious functions of church-related schools. Government cannot constitutionally support the religious functions of those schools. Neither can it seek to control or supervise those functions. Such governmental action would result in serious inhibition of religion and lead to the very form of government entanglement and involvement with religion that *Walz* declared to be excessive and impermissible. Indeed, a public aid program authorizing such administrative action would smack of an unconstitutional condition upon the availability of government funds. See *Speiser* v. *Randall*, 357 U.S. 513 (1958).

Thus, when government undertakes to aid secular education, benefits derived by religiously affiliated schools from the program will not have a primary effect that either advances or inhibits religion if only the secular educational functions of those schools are aided and if the administrative relationships created by the program are no more extensive than necessary to assure a proper and constitutional use of the public funds.

B. APPLYING THE GOVERNMENT PRINCIPLES

A proper application of the governing constitutional principles outlined above to the facts of this case leads inescapably to the conclusion that the Salary Supplement Act passes constitutional muster. The District Court reached a contrary conclusion because, at two critical points in its analysis, it departed from those governing principles by refusing to determine the primary effect of the Salary Supplement Act, and by seriously misconstruing the *Walz* doctrine of "excessive entanglement."

1. Purpose of the Salary Supplement Act

The District Court properly concluded that the Salary Supplement Act "was not intended to advance or interfere with religion." J.A. 39. No other conclusion is fairly possible in light of the express statement of legislative purpose in the statute. R.I. Gen. Laws § 16-51-1. And *Allen* makes that statutory statement controlling on the issue of purpose. Faced with a deepening crisis of educational quality in the State's nonpublic schools, the General Assembly acted to acquit its constitutional duty "to secure to the people the advantages of education"[30] and to implement "the policy of the state of Rhode Island to provide a quality education *for all Rhode Island youth.*"[31] Aware that "teachers are the prime factor in educational quality," the General Assembly responded to that crisis by providing State funds to permit nonpublic schools "to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." In addition, the General As-

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[30] R.I. Const. art. XII, § 1.

[31] R.I. Gen. Laws § 16-51-1. (Emphasis added.)

sembly provided the salary supplement aid to nonp
lic schools under a statutory scheme carefully tailo
to assure it would aid only secular teaching in
ligiously affiliated schools that might benefit from
Against that background, the District Court declar

> "Certainly, the quality of education in nonpul
> schools is a legitimate legislative concern. *Bo*
> *of Education* v. *Allen,* 392 U.S. at 245-47. We f
> nothing in the history and structure of the
> which suggests that the legislative purpose
> other than as declared." J.A. 39.

Despite the unmistakably secular purpose of
Salary Supplement Act, the appellees have insis
that an impermissible religious purpose be read i
the statute because, they allege, the General Assem
acted out of improper motives. They discern th
improper motives from the fact that certain religi
leaders favored the legislation [32] and that modificati
made by the General Assembly in the Act as int
duced [33] left teachers in religiously affiliated nonp
lic schools as the principal beneficiaries of the leg
lation. The District Court correctly rejected appelle
invitation to search for the "real" motive of the G
eral Assembly, J.A. 39, and declined "to consider e
dence concerning the activities of proponents of

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[32] For example, the appellees' counsel at trial questioned
Edward W. K. Mullen, Superintendent of Schools for the Ro
Catholic Diocese of Providence, at length about his support for
Act while it was pending before the General Assembly. J.A. 59
The Court below necessarily viewed all of that evidence as irr
vant when it stated: "[W]e necessarily reject plaintiffs' atte
to divine the 'true intent' of the legislature by inspecting the
tivities of lobbyists." J.A. 39.

[33] The Salary Supplement Act, as introduced in the Gen
Assembly, was placed in evidence by the appellees. Plainti
Exhibit No. 6, J.A. 178.

Salary Supplement Act." J.A. 30, n. 2.[34] For this Court has long adhered to the rule that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien,* 391 U.S. 367, 383 (1968); see *Daniel* v. *Family Security Life Ins. Co.,* 366 U.S. 220, 224 (1949); *Arizona* v. *California,* 283 U.S. 423, 455 (1931); *McCray* v. *United States,* 195 U.S. 27, 56 (1904).

That salutary principle is particularly appropriate in this case. For example, the appellees were highly selective in identifying those who favored the contested legislation. Because the General Assembly does not publish its proceedings, it is impossible to determine how broad-based support for the statute was. The appellees also emphasized an amendment to the original bill that limited the salary supplement payments to teachers in nonpublic schools with per pupil expenditures for secular education that do not equal or exceed the per pupil expenditures in public schools.[35] That amendment has had the effect of excluding most nonreligiously affiliated, nonpublic schools in Rhode Island from the scope of the statute.[36] But, as the court

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[34] It is, of course, clear that support for legislation by religious leaders does not impart a religious purpose to that legislation. "The fact that religious leaders sponsored a law—or even were its sole sponsors—does not make its purpose nonsecular; the Civil Rights Act of 1964 might not have passed without the support of churchmen." J. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 277 (1968).

[35] *Compare* Plaintiffs' Exhibit No. 6, § 16-49-2, J.A. 179, *with* R.I. Gen. Laws § 16-51-2, J.A. 183-84.

[36] Even without that amendment, teachers in religiously affiliated schools would be the principal beneficiaries of the Act since Catholic parochial schools enroll 95 per cent of all children attending nonpublic elementary schools in Rhode Island. J.A. 32.

below pointed out, that amendment "serves the legitimate secular purpose of saving state funds by eliminating schools which can well afford qualified teachers." J.A. 40.

The appellees' motive argument is an undeserved insult to the integrity of the legislative process. In enacting the Salary Supplement Act, the General Assembly was carrying out a duty imposed on it by the Rhode Island Constitution and an established state policy to promote the education of all children, irrespective of where they attend school. The legislative concern for nonpublic schools is particularly compelling in Rhode Island where those schools educate 25 per cent of all children at the elementary level. This Court observed in *Allen:*

> "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." 392 U.S. at 247.

The statement of purpose in the Salary Supplement Act demonstrates that the General Assembly was seeking only to implement those values. That 95 per cent of children enrolled in nonpublic elementary schools in the State attend religiously affiliated schools can hardly require the General Assembly to show less concern for the quality of secular education they receive.

2. Primary Effect—No Advancement of Religion

The Salary Supplement Act was designed to improve the quality of secular education in Rhode Island's nonpublic schools. Both the statutory requirements for eligibility for salary supplement payments and the evi-

dence presented at trial show that the enactment's purpose has been achieved without aiding the religious functions of church-related schools that benefit from the statute. For that reason, the statute has generated a primary effect that does not advance religion within the meaning of the *Allen* decision.

The General Assembly knew that teachers in religiously affiliated schools would seek benefits under the Act, and it imposed strict eligibility requirements to assure that only teachers engaged in purely secular educational functions in those schools would qualify. Three of the eligibility requirements are especially relevant.[37] First, only teachers who teach subjects which are required to be taught by state law or which are actually taught in public schools are eligible for salary supplement payments. The State cannot require the teaching of subjects with religious content. Neither can it offer subjects with religious content in the public schools.[38] This eligibility requirement, therefore, assures that only teachers of secular subjects in religiously affiliated schools will receive the salary supplement.

Second, teachers receiving the supplement are required to use books and other teaching materials that are in use in the public schools. The State cannot constitutionally prescribe textbooks with religious content

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[37] Those eligibility requirements are found in R.I. Gen. Laws § 16-51-3, J.A. 184-85.

[38] See *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

for use in the public schools. See *Board of Education* v. *Allen*, 392 U.S. 236, 244 (1968).[39] As a result, this provision assures that teachers receiving State aid will be using teaching materials and textbooks devoid of religious content. And the prescribed textbook is the principal source of course content at the elementary level of education.

Finally, teachers receiving salary supplements are expressly prohibited from teaching a course in religion. This provision is implemented by the requirement that a teacher applying for the supplement sign a statement promising that he or she will not engage in religious teaching while receiving the supplement.[40]

These three eligibility requirements have the effect of restricting the salary supplement payments to teachers engaged in the strictly secular educational functions of religiously affiliated schools. The appellees presented no evidence to show that any teacher not complying with those requirements had qualified for benefits under the statute. Moreover, the appellants presented unrefuted evidence to demonstrate that teachers in Roman Catholic elementary schools who had qualified for supplement payments taught only secular subjects and

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[39] Rhode Island law expressly prohibits the Commissioner of Education from recommending any textbook "of a sectarian nature or containing sectarian material" for use in the State's public schools. R.I. Gen. Laws § 16-1-9.

[40] An application form completed by appellant Earley, which contains the standard disclaimer signed by nonpublic school teachers seeking salary supplements, was allowed in evidence as Plaintiffs' Exhibit No. 11. J.A. 187-88.

did not introduce religion into those courses.[41] In addition, the Diocesan Superintendent of the Catholic schools testified that any introduction of religion into the secular subjects taught in those schools would be contrary to his policies. J.A. 87. Based on that uncontradicted evidence, the District Court made an express finding that religion did not affect the content of secular courses in Catholic parochial schools. J.A. 35. It is clear, therefore, that, to the extent that teachers in those Catholic schools benefit from the challenged statute, only the secular educational functions of those schools are aided by State funds.

The appellants also presented uncontroverted evidence to show that the Salary Supplement Act has had a dramatic impact on the quality of teachers employed by Catholic parochial schools. In the school year immediately preceding the enactment of that statute, the parochial schools were able to offer a starting salary of only $5,000, and they had great difficulty recruiting teachers with adequate educational backgrounds. J.A. 88. After the statute became operative, the parochial schools were able to offer a starting salary of $6,000, J.A. 88-89, and they experienced "a considerable increase in the quality of teachers" seeking employment. J.A. 88. The District Court's opinion reflects that evidence in finding that "the statute will have the significant if temporary effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools." J.A. 37.

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[41] J.A. 103, 108, 111, 114, 116. In their post-trial brief, the appellees argued that there is necessarily religious permeation of secular courses in the parochial schools. That argument was based not on the testimony of any teacher but on the contents of one document the appellees placed in evidence. Plaintiffs' Exhibit No. 14. The fallacies of the appellees' permeation argument are examined at pages 71-75, *infra*.

Consequently, the Salary Supplement Act has generated the precise effect contemplated by the General Assembly—the improvement of the quality of secular education in the State's nonpublic schools. Under the *Allen* decision, that effect must be viewed as "primary" for Establishment Clause purposes. In addition, that effect has been achieved by supporting only the secular educational functions of religiously affiliated schools. Any benefit to religion from the statute is purely collateral and incidental. For that reason, the primary effect of the statute does not advance religion. As a result, the Salary Supplement Act meets all of the requirements of the *Allen* decision for Establishment Clause validity.

Despite the clarity of the record on this issue, the District Court balked at ruling that the statute's primary effect is not to advance religion.[42] It refusal to do so is simply at war with this Court's decision in *Allen*.

The majority in the District Court created for itself an illusory dilemma when it identified two "significant" effects of the Salary Supplement Act. The first was the improvement in the quality of secular education in Catholic parochial schools. The second was that "the Act gives significant aid to a religious enterprise." J.A. 37. Faced with two effects it had labeled as "significant," the majority declined to engage in further analysis, commenting that any effort to isolate a "primary" effect would be "no more satisfactory than efforts to rank the legs of a table in order of importance." J.A. 40. The *Allen* test of primary effect

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[42] It was on this precise point that Judge Pettine dissented from the majority decision. J.A. 48-50.

necessarily presupposes that more than one effect has resulted from a challenged statute. Unless *Allen* is to be overruled, it is the task of courts to analyze the statute's several effects in light of that decision's principles and to identify the effect that is primary.

The essential error of the majority below was to equate by the use of the label "significant" two effects which, under this Court's decisions, do not have equal constitutional significance. The central concern of the Establishment Clause is whether public educational assistance is limited to the secular functions performed by religiously affiliated schools that benefit from it. If the aid is so limited, it is constitutionally immaterial that such schools derive tangible benefits from the aid program. It is this critical distinction that the majority below obscured by attaching the label "significant" to the two effects it identified in its opinion.

Moreover, the evidentiary base for the majority's ruling that a "religious enterprise" is aided by the challenged statute is open to serious question. In concluding that parochial schools are "religious enterprises," the majority resorted principally to appellees' evidence which sought to establish that a "religious atmosphere" existed in Catholic parochial schools. That evidence showed, *inter alia,* that parochial schools place religious symbolism on and within their buildings, recite prayers in classrooms, teach a course in religion,[43] and engage in certain other religiously oriented activities. From that evidence, the majority drew an

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[43] It should be noted, however, that the school day is one-half hour longer in the parochial schools than in the public schools. The extra half hour is to permit the parochial schools to teach religion while still offering the complete secular curriculum required by Rhode Island's compulsory attendance law. J.A. 126.

obvious conclusion—namely, that "the diocesan schools possess a number of distinctively religious attributes which distinguish them from public schools." J.A. 35. But that fact was not in dispute in this litigation. Indeed, the appellants conceded that parochial schools are different from public schools.[44] But that fact cannot be decisive of the Establishment Clause issue in this case. For, although the "meager record" in the *Allen* case did not permit findings on the religious "atmosphere" or activities of the parochial schools that benefited from the New York textbook loan law, it can be assumed that those schools did not differ markedly in their religious attributes from the Rhode Island parochial schools.

The majority below also surmised[45] from the appellees' evidence on "religious atmosphere" that the Roman Catholic Church "gains special advantage from a curriculum which contains both religious and secular subjects" and that "the diocesan school system is an integral part of the religious mission of the Catholic Church." J.A. 36. But those factors are also without controlling constitutional significance. For, in the *Walz* decision, this Court endorsed the decision in *Everson* v. *Board of Education, supra,* while acknowledging that

> "bus transportation and police protection to pupils who receive religious instruction 'aid' that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not

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[44] See Trial Transcript 22 (March 19, 1970).

[45] See note 11 *supra,* and accompanying text.

dominant policy of church schools." 397 U.S. at 671.

Thus, this Court has expressly recognized that the critical issue is not whether schools assisted by public expenditures are religious in nature or whether those schools are maintained and perpetuated by their adherents for subjective religious reasons. The critical issue is whether those schools, in addition to their religious functions, are providing a secular education for their students that government can aid without infringing upon core Establishment Clause values. And *Everson* and *Allen* make clear that those constitutional values will be fully protected if the public assistance is strictly limited to the secular educational functions of those schools.

The lesson of *Everson* and *Allen* is that government does not aid a "religious enterprise" when it extends secular educational assistance to religiously affiliated schools. Rather, government aids only an *educational enterprise* which happens to have certain religious attributes, as long as those religious attributes are not the object of the public assistance. Judge Pettine, in his separate opinion, most clearly recognized that important distinction when he declared that the statute in question cannot be viewed as aiding a religious enterprise absent proof "that the secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment." J.A. 49. Judge Pettine found the record in this case "barren" of any such proof, *id.*, a finding that the majority necessarily endorsed in stating that the concern for religious values did not "affect the content of secular subjects in diocesan schools." J.A. 35.

The majority below did not depart from the path of constitutional analysis marked out by *Allen* without

some apparent uneasiness.[46] For it attempted to justify its "religious enterprise" thesis by arguing that the focus on secular functions mandated by *Allen* could lead to abuse through "sophisticated bookkeeping." J.A. 41. That term has pejorative ring to it, suggesting that parochial schools might seek aid for their religious functions by juggling their books. The majority tried to disclaim such an inference by stating that "we do not intend our reference to 'sophisticated bookkeeping' to imply only sham allocations of expenditures." J.A. 41, n. 9.[47] Rather, the majority ex-

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[46] In fact, the majority sought to buttress its refusal to follow the *Allen* decision by placing two glosses on the salary supplement program that simply have no basis in fact. First, the majority characterized the *Allen* focus on the secular educational functions of religiously affiliated schools as "narrow" and "unrealistic when examining direct financial aid to denominational schools." J.A. 41. The majority could make that comment in the context of this case only by disregarding the fact that the salary supplement payments are made directly to individual teachers by the State. R.I. Gen. Laws § 16-51-5. There is simply no "direct financial aid to denominational schools" under the Salary Supplement Act.

Second, the majority seems to imply that state funds are assisting the "maintenance of an educational environment within which religious instruction takes place in varied ways." J.A. 41, n. 9. But the Salary Supplement Act provides no assistance to an educational "environment." State funds are paid to qualified teachers of secular subjects so that children attending nonpublic schools will receive a higher quality secular education.

[47] Judge Pettine did not share the majority's apprehension of "sophisticated bookkeeping." He said of that portion of the majority's opinion:

> "Such reasoning equates the legal and bookkeeping definitions of 'secular' and 'religious.' The law is equipped to distinguish bookkeeping entries from legally distinct entities. The secular-religious distinction is fundamental; it will take more than accounting machinations to elude it." J.A. 49.

Judge Pettine's analysis is for more consistent with the proper role of the judiciary in constitutional adjudication. See *Walz* v. *Tax Commission*, 397 U.S. 664, 679 (1970).

plained that it was concerned that even an honest allocation of parochial school expenditures would show that those schools spend only a small portion of their funds on their religious functions. For that reason, the majority feared that application of the secular function rule of *Allen* would require the validation of a public assistance program that made far greater amounts of government funds available to aid religiously affiliated education. J.A. 41, 43. But if the Constitution permits the government to aid secular educational activities, it is not a proper function of the judiciary to worry whether a greater or lesser amount of public funds should be allocated to those activities in schools with religious affiliations. In expressing those concerns in this case, the majority below was speculating on whether additional aid to the secular functions of church-related schools would be wise legislative policy. Such considerations are beyond the scope of federal judicial power. For the judiciary is limited to deciding whether an exercise of legislative power is constitutional—not whether it is wise.

For these several reasons, the court below clearly departed from the governing Establishment Clause principles when it declined to rule that the Salary Supplement Act had generated a primary effect that did not advance religion. The requirements for eligibility under that statute and the record in this case demonstrate beyond dispute that such a primary effect has resulted from the statute's operation. For that reason, the Salary Supplement Act meets the test laid down in *Allen* for constitutional validity.

3. Primary Effect—No Inhibition of Religion

The District Court was unanimous in its conclusion that the Salary Supplement Act would produce unconstitutional involvement between government and religion and that the statute contravened the Establishment Clause for that reason. The District Court's ruling on that issue represents, at best, a misunderstanding and a misapplication of this Court's recent decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970).[48]

As noted earlier in this brief,[49] *Walz* is the focal point for the second phase of the primary effect inquiry—namely, whether a contested statute inhibits religion through excessive and impermissible involvement of government with religion or religious institutions. The precise concern expressed in *Walz* was with the administrative relationships that inevitably arise between public officials and religiously affiliated schools when those schools participate in spending programs for educational improvement. 397 U.S. at 672. The court below made the administrative relationships created by the Salary Supplement Act a principal element in its *Walz* analysis. J.A. 43-44. However, that court failed to analyze those relationships critically and apparently overlooked this Court's admonition that the test of entanglement or involvement is "inescapably one of degree." 397 U.S. at 674.

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[48] The court below was the first court to apply the principles of the *Walz* decision to a public spending program for education. The *Walz* case was decided by this Court exactly four weeks after the parties to this appeal filed their post-trial briefs with the District Court. That court decided this case exactly six weeks later without giving the parties an opportunity to brief or argue the relevance of the *Walz* decision.

[49] See pages 35-39, *supra.*

The principal administrative relationships created by the Salary Supplement Act are those between teachers in nonpublic elementary schools and State officials.[50] The crucial eligibility requirements imposed by the Act are concerned with the qualifications and activities of teachers, not schools.[51] Further, the expenditure of funds under the Act results in dealings only between the State and individual teachers. Each teacher seeking a salary supplement must file an individual application with the Commissioner of Education,[52] and the supplement payments must be made directly to the eligible teachers and "not through the agency of the nonpublic school in which the teacher is employed."[53] Thus, the administrative machinery of the contested

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[50] It is this feature of the Salary Supplement Act that distinguishes it from Connecticut's Nonpublic School Secular Education Act, which a three-judge federal court recently invalidated on the authority of the *Walz* decision. *Johnson* v. *Sanders*, 39 U.S.L.W. 2225 (D.Conn., decided October 14, 1970). Under the Connecticut statute, the appropriated funds flow directly to nonpublic schools and the essential administrative relationships are between state officials and those schools. To state this distinction between the Rhode Island and Connecticut programs is to underscore the importance of recognizing that the *Walz* test of entanglement is precisely what this Court stated it to be—a question of degree. For that reason, each statutory scheme must be evaluated on its own merits and the reasoning of one court ruling on a particular statute is not readily transferable to a wholly disparate statutory scheme. Whatever the merits of the *Johnson* court's analysis, that analysis is not relevant to the Salary Supplement Act under which State officials deal primarily with individual teachers and not with nonpublic schools. And, presumably, the time for judging the merits of the *Johnson* decision will be when that case is appealed to this Court.

[51] R.I. Gen. Laws § 16-51-3.

[52] *Id.*

[53] R.I. Gen. Laws § 16-51-5.

statute generates mainly contacts between State officials and teachers in nonpublic schools, and those contacts raise no colorable Establishment Clause issue. For the concern expressed by this Court in *Walz* was with excessive and impermissible involvement between government and religion or religious institutions.

Three provisions of the Salary Supplement Act authorize administrative relationships between State officials and religiously affiliated schools, and only one of those provisions troubled the District Court.[54] The statutory definition of "nonpublic school" limits salary supplement payments to teachers employed by nonpublic schools with per pupil expenditures for secular education that do not equal or exceed the average per pupil expenditure in the public schools.[55] Thus, those administering the Act must decide whether a particular school satisfies that definition before they can determine whether teachers in that school qualify for payments.[56]

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[54] The District Court apparently perceived no Establishment Clause issue in the other administrative contacts authorized by the Act. The first is the requirement that schools employing teachers receiving salary supplements comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which proscribes discrimination in employment. The second is the statutory authorization for an audit of nonpublic school books to assure that teachers receiving salary supplements are being paid the minimum salary required by the Act as a condition for eligibility. R.I. Gen. Laws § 16-51-5. Quite obviously, neither of those provisions creates the type of administrative relationships that bothered this Court in *Walz*.

[55] R.I. Gen. Laws § 16-51-2.

[56] To assist the Department of Education in making that determination, nonpublic schools submit annually a statement of their operating expenditures on a form supplied by the Department. See J.A. 189.

The District Court's concern with that statutory provision was expressed in these words:

> "[T]he Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is 'religious' and which is 'secular.' This ongoing administrative relationship creates the possibility of legal disputes over the 'secular-religious' distinction." J.A. 43-44.[57]

The fears expressed by the court below are simply not justified by the record in this case. More importantly, the administrative relationships created by the Salary Supplement Act are, at worst, minimal and insignificant when considered in light of the long and deep involvement of the State in nonpublic education that exists apart from that statute.

The record in this case demonstrates—and the court below conceded—that, for the foreseeable future, State officials will find it unnecessary to make any close judg-

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[57] The most glaring anomaly in the District Court's reasoning is its suggestion that an Establishment Clause violation arises when public officials are required to draw distinctions between what is secular and what is religious in administering an educational assistance program. For the secular-religious distinction is fundamental to Establishment Clause doctrine. It is a distinction that legislatures must draw in defining the scope of any educational program, whether it affects public schools or religiously affiliated nonpublic schools. See, *e.g.*, R.I. Gen. Laws § 16-1-9. It is a distinction that courts must make when the validity of such programs is challenged on Establishment Clause grounds. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963). And it necessarily is a distinction that must be drawn in the administration of such programs if Establishment Clause limitations on governmental power are to have any force or effect. To suggest that drawing such a distinction is constitutionally suspect is to suggest that government is prohibited from undertaking any program in which such a distinction might arise.

ments concerning the secular-religious distinction in the expenditures of the vast majority of nonpublic schools in Rhode Island. Roman Catholic elementary schools educate between 90 and 95 per cent of all children attending nonpublic elementary schools in Rhode Island. J.A. 58. Religious orders supply a significant number of teachers to those parochial schools, and the members of religious orders are paid salaries substantially lower than the salaries paid to lay teachers.[58] For that reason, the total operating costs of parochial schools are markedly lower than the operating costs of public schools. The court below recognized that fact when it stated that "[a]s long as Catholic schools rely heavily on nuns, their wage costs are likely to remain substantially below those of the public schools, . . . thus obviating the need to break down expenditures." J.A. 32, n. 6.

In the first year of the Salary Supplement Act's operation, only two non-Catholic schools reported their expenditures to the Department of Education, and both showed total per pupil expenditures in excess of those in the public schools. One of those schools clearly did not meet the statutory definition of "nonpublic school" in terms of its per pupil expenditures, J.A. 100, 146-48, and there is no evidence to show that determination led to the conflicts and legal disputes feared by the District Court. The other school apparently presented the "close case" envisioned by the court below, but because no teacher in that school had applied for the salary supplement, there was no need for further inquiry or investigation. See J.A. 98-100, 146-48.

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[58] The parochial schools pay teachers who are members of religious orders annual salaries of $1,800 or $1,900, compared to starting salaries of $6,000 for lay teachers. See J.A. 88-89.

Thus, the potential for conflicts and disputes feared by the court below is more imagined than real. And, even when a "close case" arises, there is no evidence that conflict would necessarily flow from the administrative relationships that would result between State officials and religiously affiliated schools. The State official responsible for administering the Salary Supplement Act testified that, in a close case, he would visit the nonpublic school and seek to obtain a precise figure for the per pupil cost of secular education at that school.[59] But there is no evidence that he would approach that task in a hostile or adversary posture. He is a professional educator with long experience, J.A. 130, and, as such, has a sound working knowledge of how schools allocate their expenditures among the various component parts of their instructional program. The concept of per pupil costs is a familiar one to educators, J.A. 148, and its various elements are subject to objective evaluation by educators. The exercise of that professional judgment cannot be presumed to be a necessary source of conflict and dispute without affirmative proof of such conflict. The record of this case is devoid of such proof for the first full year of the Salary Supplement Act's operation.

Thus, in actual operation and future potential, the administrative relationships required by the per pupil cost provision of the Salary Supplement Act are minimal and non-abrasive. Yet the District Court viewed those minimal relationships, standing alone, as consti-

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[59] J.A. 100. The need for that further investigation would arise because the forms completed by nonpublic schools do not request a breakdown of secular and religious expenditures. See J.A. 136-39. However, for the overwhelming majority of nonpublic schools in the State, those forms will reveal a school's eligibility without such a breakdown. J.A. 138.

tutionally disabling under the *Walz* test of "entanglement." It could have reached that conclusion only by ignoring the critical fact that the *Walz* test, in its application, is a question of degree.

The District Court also considered the administrative relationships engendered by the Salary Supplement Act in isolation and apart from the State's many involvements in nonpublic education that long predated the challenged statute. Those other involvements cover a broad range of nonpublic school operations, including the courses to be taught, the length of the school day and school year, participation in federal and state aid programs, and provisions for the health and safety of students. The various statutes giving rise to these other involvements and administrative relationships between the State and nonpublic schools are listed and summarized in the Appendix to this brief, and they demonstrate that the administrative relationships created by the Salary Supplement Act are indeed insignificant.

The principal source of the State's involvement with nonpublic schools, including those with religious affiliations, is the State's Compulsory Attendance Law. R.I. Gen Laws § 16-19-2.[60] That statute gives local school committees a life-or-death power over all nonpublic schools. Those school committees are required to evaluate and approve nonpublic schools, and only those nonpublic schools that receive such approval can permit their students to comply with the compulsory attendance requirements. A school not receiving such approval simply cannot exist as a full-time educational enterprise for children under the age of 16. To obtain that approval, nonpublic schools must comply with a

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[60] See also R.I. Gen. Laws § 16-22-2.

series of statutory requirements, including a period of attendance "substantially equal to that required by law in public schools" and a curriculum that includes "reading, writing, geography, arithmetic, the history of the United States, the history of Rhode Island, and the principles of American government . . . taught in the English language." *Id.* The enforcement of those requirements presents a far greater potential for conflict with religiously affiliated schools than does the Salary Supplement Act, particularly since the requirements relating to curriculum content limit severely the amount of time those schools might otherwise want to devote to religious instruction.

Despite the potential for conflict inherent in compulsory attendance laws, this Court has never suggested that those laws might violate the Establishment Clause because of excessive entanglement or impermissible involvement between government and religiously affiliated schools. In fact, this Court has expressly ruled that such compulsory attendance laws are within a state's constitutional power. In *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925), the Court conceded the states' power "reasonably to regulate *all* schools, to inspect, supervise, and examine them." (Emphasis added.) The Court reiterated that principle in *Allen* when it declared that states can

> "insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." 392 U.S. at 245-46.

Those same principles have also found expression in *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947),

and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 631 (1943).

Viewed against the background of the State's broad power to regulate and supervise religiously affiliated schools under the compulsory attendance law, the administrative relationships between those schools and the State under the Salary Supplement Act are minimal and insignificant. In no sense are those relationships "excessive" or "impermissible" within the meaning of *Walz* and in no sense will they lead to the inhibition of religion, which the *Walz* test is designed to prevent.

The statutory and administrative scheme of the Salary Supplement Act is carefully tailored to assure that State funds will be spent properly and constitutionally. The eligibility requirements imposed on individual teachers are designed to limit the public aid to the secular educational functions of religiously affiliated schools, as *Allen* requires. And the enforcement of the statute's per pupil cost provisions prevents the squandering of public money on schools that can afford to hire qualified teachers with their own funds. J.A. 40. No State involvement with the religious functions of church-related schools is required and none results. Consequently, the Salary Supplement Act does not have the effect, primary or otherwise, of inhibiting religion.

4. Other Walz-Related Issues

The District Court's apparent misunderstanding of the *Walz* decision is reflected in other aspects of its primary effect analysis. For example, the District Court seemed to construe the *Walz* test of entanglement as having displaced and superseded the *Schempp-Allen* concern with whether an enactment advanced or

inhibited religion. That is the only explanation for the following sentence from the District Court's opinion:

> "*Walz* thus makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards." J.A. 42.[61]

To read *Walz* as displacing the *Schempp-Allen* test of primary effect is to disregard the factual context in which the *Walz* test of entanglement was applied.

At issue in *Walz* was the constitutional permissibility of exempting church property from taxation. Had the Court held such exemptions to be constitutionally prohibited, government would have had only one alternative—to tax church property. The Court conceded in *Allen* that the *Schempp* test "is not easy to apply," 392 U.S. at 243, a concession that became an understatement in light of the dilemma posed by *Walz*. For exempting church property from taxation "helped" (*i.e.,* advanced) religion just as surely as taxing that property would have "hurt" (*i.e.,* inhibited) religion. When the only alternatives facing government are to

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[61] The District Court also observed that "neither the majority nor concurring opinions [in *Walz*] rely on the *Schempp* formulation." J.A. 42, n. 10. That observation is inaccurate since the majority in *Walz* examined both the purpose, 397 U.S. at 672, and the effect, 397 U.S. at 674, of exempting church property from taxation. It is true that the Court in *Walz* did not quote the *Schempp* formulation of the purpose and primary effect test. But that formulation appears verbatim in *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968), a decision which the majority in *Walz* cited with obvious approval. 397 U.S. at 371-72.

advance or inhibit religion, it is an idle and unprofitable exercise to analyze the effects of those alternatives in terms of whether they advance or inhibit religion. Under such circumstances, it was wholly appropriate for this Court to look solely to whether one alternative or the other would lead to lesser involvement of the government with religion.

That same dilemma is not present when the government action results in benefits to religiously affiliated institutions that perform both secular and religious functions. Such government action does not necessarily either advance or inhibit religion, and the *Schempp-Allen* formulation of the primary effect analysis is the most appropriate and most viable constitutional test to apply. Indeed, an exclusive concern with entanglement and involvement would be wholly inadequate to reveal constitutional defects in some public spending programs. For example, an unrestricted grant of public funds to a religious institution performing both secular and religious functions would presumably satisfy the *Walz* test of entanglement, since no administrative relationships would be created. But that test would not reveal whether such an unrestricted grant would impermissibly aid the religious functions of that institution. The secular function inquiry of the *Allen* test fills that analytical gap.

To state this critical distinction is simply to acknowledge that the test of purpose and primary effect formulated by the *Schempp* and *Allen* decisions will not necessarily resolve all Establishment Clause issues. The same is true of the *Walz* test of entanglement. But the question of whether an enactment advances or inhibits religion is the most appropriate constitutional standard when government assistance to secular education

in church-related institutions is at issue. The Court recognized that fact less than two years ago when it applied the *Schempp* test to that precise issue in the *Allen* decision. *Walz* supplements the *Schempp-Allen* test of primary effect by making the entanglement factor the focus of the inhibition analysis.

In its *Walz* analysis, the court below also discussed a form of entanglement between government and religion that it feared would arise independently of the administrative relationships created by the Salary Supplement Act. Noting that appropriations under the Act, unlike tax exemptions, must be renewed annually, the District Court was apprehensive that "the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy." J.A. 43. The District Court also speculated that "[i]n Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools." *Id.* The court below clearly indicated that the mere possibility of the "bitter controversy" it perceived was sufficient to invalidate a statute under the *Walz* test of entanglement.

Any constitutional rule that strikes down legislation on the basis of controversy existing in the political forum will inevitably sow the seeds of the very controversy it seeks to avert. For that rule will encourage the initiation and prolongation of controversy by those who fail to convince the legislature that a particular statute is unwise or who fail to persuade a court that it is unconstitutional. Such a rule would give a virtual constitutional veto to anyone who shouted long enough and loudly enough and would place a premium on per-

petuating the very form of strife and controversy that the District Court wanted to avoid.

Equally important is the unjustifiably myopic view that the District Court took of the public debate over aid to nonpublic education. The District Court apparently assumed that, because religious organizations have traditionally played a major role in nonpublic education in this country, the proponents and opponents of such aid must necessarily align according to religious divisions. But more is at stake in the debate than whether one or more religiously affiliated schools will derive some benefits from such aid programs. One of the most fundamental issues in that debate is bereft of religious overtones—namely, whether our children must be educated in a uniform system of public schools which offer the same education to all or whether parents and children can make choices in a mixed system of public and private schools on the basis of the type and quality of education offered.

Because of the prominent role traditionally played by religious organizations in nonpublic education, their voices will inevitably be heard in that debate. But those groups are not constitutionally barred from raising their voices in the political forum. As this Court observed in *Walz*:

> "Adherents of particular faiths and individual churches frequently take strong positions on public issues, including . . . vigorous advocacy of legal and constitutional provisions. Of course, churches as much as secular bodies and private citizens have that right." 397 U.S. at 670.

The court below would turn the exercise of that right into a reason for invalidating legislation, particularly

if opposition to a position taken by a religious organization on legislation is framed in religious terms. No rule of constitutional law could be more subversive of our democratic processes or more disparaging of the ability of our system of government to accommodate differences of opinion, no matter how deeply held, on important public questions.

At root, the District Court's readiness to strike down the Salary Supplement Act because there may be pressure in the future from religious or anti-religious groups to expand or contract the program's scope has no foundation in constitutional law. At best it represents *in terrorem* rhetoric. This Court long ago admonished that "alarms . . . are not arguments," *United States* v. *Ohio Oil Co.*, 234 U.S. 548, 575 (1914), and warned that to "push propositions to the extremes to which they . . . [might theoretically] lead is often an unsafe guide" in constitutional adjudication. *Northern Securities Co.* v. *United States,* 193 U.S. 197, 397 (1904). The record in this case is barren of any proof that the passage of the Salary Supplement Act and its operation for more than one year has sparked the sectarian controversy envisioned by the court below. Indeed, the only significant controversy to date has been generated by the six taxpayers who initiated this litigation, and their complaints have been heard through the orderly judicial process without sapping the vitality of political life in Rhode Island.

An additional concern of the District Court was that "the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools." J.A. 44. In particular, the District Court worried that there would evolve "a sub-

stantial limitation on the freedom of parochial schools to set their own curriculum." *Id.* The District Court, of course, overlooked the far more severe limitations on that "freedom" which are imposed by the presumptively valid Compulsory Attendance Law. Equally significant is the District Court's apparent assumption that the Salary Supplement Act makes parochial schools the coerced and unwilling victims of such supposed limitations on their freedom. But no school is compelled by the State to arrange its affairs so that its teachers will become eligible for salary supplement payments. *Cf. Steward Machine Co.* v. *Davis,* 301 U.S. 548, 585-93 (1937). Participation in the benefits of the Act is wholly voluntary, and there is no proof that any school has unwillingly or unwittingly conformed to its requirements. In fact, there is evidence that some schools have deliberately exercised their choice not to participate. J.A. 149-50.

Even if it is assumed that parochial schools must surrender some of their "freedoms" to qualify their teachers, the concept of waiver is not unknown in constitutional law. An uncoerced decision to alter an otherwise acceptable course of behavior presents no constitutional question, absent a showing that the decision has been induced by imposition of an unconstitutional condition. But there has been no suggestion of such an unconstitutional condition in this case and, if one did exist, those subject to that condition would presumably be the proper parties to complain about it. To raise the specter of a possible loss of a freedom by schools making no such complaint seems more an expression of judicial paternalism than the application of a rule of constitutional law.

C. APPELLEES' CONTENTIONS

The appellees in the court below based their constitutional claims on arguments that were clearly at odds with this Court's Establishment Clause decisions. Several of those arguments warrant discussion in this brief.

1. The "No Aid" Concept

The appellees' principal constitutional argument was based on the decision in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), which they construed as barring all public aid programs that benefit religiously affiliated schools. They derived that rule of law from the following sentence in the *Everson* majority opinion:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16.

The court below rejected the appellees' literal reading of that isolated sentence, recognizing that this Court has never held that the Establishment Clause prohibits all public assistance to religiously affiliated institutions. Indeed, the District Court noted that, "[a]lthough in both *Everson* and *Allen* tax funds were used to support religious institutions, in both the aid was sustained." J.A. 38; see also *Tilton* v. *Finch,* 312 F.Supp. 1191, 1196-7 (D.Conn.), *prob. juris. noted,* 399 U.S. 904 (1970).

This Court has taken a similar view of the "no aid" connotations of the *Everson* decision. In *Walz,* the Court commented on "[t]he hazards of placing too much weight on a few words or phrases of the Court," and it referred to the very paragraph in *Everson*

containing the "no tax" language relied upon by the appellees. 397 U.S. at 670. The Court expressed some sympathy for Justice Jackson who, in his *Everson* dissent, seemed perplexed that the result in that case was inconsistent with the "no aid" language of the majority. But the Court left no doubt that it was the language of the Establishment Clause, and not language torn from the context of a single opinion, that was controlling. 397 U.S. at 671.

The essential difficulty with the appellees' heavy reliance on the "no tax" language in *Everson* is that the Court neither intended to nor did it in fact postulate that sentence as a legal test to assess the validity of all public spending programs for education which benefit church-related education. The sentence containing the "no tax" language is one of several in *Everson* in which the Court attempted, in very broad and abstract language, to describe the general categories of problems which fall within the purview of the Establishment Clause. See 330 U.S. at 15-16. But that sentence was in no sense self-defining in the limitations it suggested that the Establishment Clause imposed upon government spending power. The Court has looked elsewhere for the test of those limitations, and the constitutional standard that has evolved from the Court's Establishment Clause decisions is the purpose and primary effect test as articulated principally in *Schempp* and *Allen*.

2. Aid to Church Treasuries

The appellees argued in the court below that the Salary Supplement Act is fatally defective because it provides a direct subsidy to churches. That argument took this form: The financial responsibility for the

operation of parochial schools in Rhode Island rests principally with the parish that operates the school. For the 1969-1970 school year, those parishes made a commitment to pay a starting salary of $6,000 per year. That commitment was made with the expectation that 15 per cent of the total starting salary, or $900, would be paid by the State in the form of a salary supplement. But, if the salary supplement payments were unavailable, the parishes would have to pay the extra $900. See J.A. 92. Thus, the appellees reasoned, the contested statute relieved churches of part of their financial responsibility and, as such, constituted a direct subsidy to those churches.

The court below necessarily rejected the appellees' argument on this issue when it made an express finding that "[t]he Salary Supplement Act will not relieve the parishes . . . of their escalating [financial] burden, but will temporarily enable parochial schools to compete for qualified teachers." J.A. 32. That finding was based on the total evidence presented on the issue of the financial benefits flowing from the Act, rather than on the appellees' selective reading of that evidence.

Although there was testimony that the parochial schools made a "commitment" to pay a $6,000 starting salary before the enactment of the challenged statute, J.A. 91, all of the teacher contracts placed in evidence by the appellees were signed after the General Assembly approved that statute. J.A. 274-83, 110-11. In addition, three of the contracts in evidence were expressly conditioned on the availability of the salary supplement payments. J.A. 278, 279, 283. The evidence also shows that the parochial schools offered a starting salary of $5,000 for the 1968-1969 school year,

J.A. 88, and that only $900 of the additional $1,000 offered for the 1969-1970 school year would be absorbed by salary supplement payments. J.A. 89. Thus, the out-of-pocket expenses of parochial schools, and the parishes which support them, for teacher salaries *increased* during the first year of the Act's operations. And, as the District Court noted, salary increases in public schools would require the parochial schools to increase their out-of-pocket expenditures for the 1970-1971 school year by 10 per cent over the 1968-1969 school year. J.A. 32-33.

Thus, the Salary Supplement Act has simply not resulted in any savings to the parishes which support parochial schools. The appellees' contrary argument is premised not on the consequences of the statute's operation but on the consequences that would flow if the statute were now to cease operating. For the parishes would have been obligated to pay the additional $900 for the 1969-1970 school year only if salary supplement payments had been enjoined by court order. The District Court found that circular reasoning unpersuasive.

However, even if a savings to the parishes could be demonstrated, the appellees still would not have made out an Establishment Clause claim. For this Court in *Walz* approved the holding in *Allen* even though it viewed the New York textbook loan law as providing "aid" to churches sponsoring schools which "relieved those churches of an enormous aggregate cost for those books." 397 U.S. at 671-72. The reason for refusing to strike down a statute because religiously affiliated schools might realize tangible benefits from it was perhaps best stated by the Court 40

years ago in *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 375 (1930).[62]

> "The schools . . . are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. . . . Its [the state's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Cochran reinforces the principle that, when the state seeks to improve the quality of secular education generally, it is the state and school children who are the true beneficiaries of the legislation—not the schools that educate those children.

3. Permeation and the Handbook

Apparently mindful of the burden imposed on them by the *Allen* decision, the appellees sought to construct an argument in their post-trial brief that secular teaching in parochial schools is permeated by religion. If the appellees could establish such permeation practices by teachers receiving salary supplement payments, they would presumably prevail under the Establishment Clause theory advanced by this brief. See pages 34-35, *supra*. However, the evidentiary materials from which the appellees sought to construct their permeation argument are fragile and suspect and, in most respects, are contradicted by more persuasive evidence in the record.

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[62] *Cochran* involved a Fourteenth Amendment challenge to a Louisiana statute which provided textbooks for use in nonpublic schools, including those with religious affiliations. This Court placed substantial reliance on *Cochran* in ruling in *Allen* that parochial schools perform the distinct functions of secular education and religious instruction. See 392 U.S. at 247.

The principal source of the appellees' permeation argument is the Handbook of School Regulations of the Diocese of Providence, which the appellees placed in evidence over strenuous objections. J.A. 56-58, 67-70, 93-96, 120-27. The bases for those objections were that the appellees had not laid a proper foundation for the document's admission in evidence, that many parts of the Handbook had never been in force or effect, and that other parts of the Handbook had been superseded by directive or contrary practice. J.A. 56-57. The District Court, however, allowed the Handbook in evidence after counsel for appellants identified a number of provisions in that document which were no longer in force or effect. J.A. 120-27.

Despite the conditions under which the Handbook was admitted in evidence, the appellees have continued to rely on the deleted portions of that document, and two of those deleted provisions are the appellees' sole support for their permeation argument. In a section headed "Religious Activities," the Handbook states that religious formation is not to be confined to formal courses but is to be achieved, *inter alia,* through "the manner in which the curriculum is taught." J.A. 212. The District Court was told that the quoted words did not represent the policy or practice of the parochial schools. J.A. 124. In addition, the Handbook section entitled "Mission Program," states that teachers should integrate mission materials with their teaching and that "[t]his is especially true in the social sciences." J.A. 220. Again, the District Court was informed that the quoted words did not reflect the practice or the policy of the parochial schools. J.A. 124. Yet, relying exclusively on those two inoperative provisions, the appellees argued: "Can it be constitutional for a

state to subsidize the salaries of teachers in church schools who 'integrate' all their instruction with religious content but refrain from conducting the formal 30-minute daily course in religion?" Post-Trial Memorandum of Plaintiffs, p. 19.[63]

The defects in the appellees' permeation argument are obvious and demonstrable. The sole source of that argument is a document whose credibility and operative effect is, at best, open to serious question. Arrayed against that meager evidence is uncontradicted testimony that teachers in parochial schools do not introduce religious content into their secular courses. The Diocesan Superintendent of those schools, whom the appellees called as their witness, testified that the use of secular courses as vehicles of religious formation or instruction would be contrary to his policies. J.A. 87. The parochial school teachers who appeared as witnesses at the trial testified uniformly that they did not inject religion into their secular courses. J.A. 103, 108, 111, 114, 116. And, as the majority in the District Court observed, that testimony "gains added credibility from the fact that several of the teachers were non-Catholics." J.A. 35. Judge Pettine perhaps

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[63] The appellees also noted that the Salary Supplement Act does not expressly prohibit a teacher receiving state funds from introducing religion into secular subjects. Post-Trial Memorandum of Plaintiffs, p. 19. However, the eligibility requirements imposed on teachers seeking salary supplement payments, R.I. Gen. Laws § 16-51-3, can be fairly read to impose such a limitation, particularly since that limitation is constitutionally compelled. More importantly, however, the appellees were unable to produce any proof of permeation by teachers receiving salary supplement payments, despite the absence of any explicit statutory limitation. And there is evidence that such teachers are sensitive to the obligations imposed on them when they receive funds under the Act. J.A. 244.

best summarized the evidence on the issue of permeation:

> "In the instant case not only is the record barren of any proof that the teaching of secular subject matter is a 'religious enterprise,' but also there is *unanimous unrebutted testimony* from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes." J.A. 49. (Emphasis added.)

The majority opinion, if anything, reinforces that review of the evidence on the issue of permeation. See J.A. 35, 36.

The appellees were, of course, free to challenge the credibility of testimony on the issue of permeation by confronting the various witnesses with the apparently contradictory provisions of the Handbook. But the appellees studiously avoided such a confrontation. Not a single witness was asked to reconcile his testimony with the Handbook provisions the appellees relied on in their post-trial brief. In fact, those teachers who were questioned about the Handbook said that they knew nothing about the Handbook, J.A. 113, 116, or that the Handbook had no bearing on their teaching methods. See J.A. 103.

In *Allen*, this Court refused to rule that "all teaching in a sectarian school is religious" because "[n]o evidence has been offered about particular schools, particular courses, [or] particular teachers." In this case, evidence was presented about particular schools, particular courses and particular teachers. And that evidence shows without contradiction that the secular courses taught in parochial schools by teachers receiving salary supplements are unaffected by religion. The appellees made a feeble effort in their arguments

after trial to overcome that evidence by quoting some inoperative provisions from a document that has doubtful relevance to the operations of parochial schools. If the appellees are permitted to prevail on such highly suspect evidence, then the burden imposed by *Allen* on those seeking to prove permeation is meaningless.

D. CONCLUSION

When a legislative program results in a confluence of government and religious interests, the Establishment Clause requires only that the enactment have a secular purpose and a primary effect that neither advances nor inhibits religion. That constitutional standard recognizes that it would be an idle and futile gesture to seek to relegate government and religious groups to wholly separate spheres of activity in our society, particularly when improving the quality of secular education is at stake. The command of the Establishment Clause is that government maintain a posture of neutrality when its interests and those of religious groups coincide. The purpose and primary effect test, as articulated and applied by this Court, fully implements the command of neutrality and gives a full measure of protection to Establishment Clause values. Judged by that constitutional standard, the Salary Supplement Act satisfies constitutional requirements.

II.

THE APPELLEES' FREE EXERCISE CLAIM

The appellees' complaint also alleged that the Salary Supplement Act violated the Free Exercise Clause of the First Amendment because it amounted to "compulsory taxation for the support of religion or re-

ligious educational institutions." Complaint ¶ 21, J.A. 8, 20-21. The court below found no merit in that claim because the appellees "failed to introduce the kind of particularized evidence necessary" to support such a claim. J.A. 37-38. The District Court's ruling on that issue was compelled by this Court's decisions.

This Court has consistently ruled that a free exercise claim depends upon a showing of direct government pressure operating upon individuals. See, *e.g., Engel* v. *Vitale,* 370 U.S. 421, 430 (1962). The governmental pressures which the Free Exercise Clause prohibits are those which coerce an individual to believe or disbelieve in a particular religion or in religion in general. See *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). Thus, in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 223 (1963), the Court declared that "it is necessary in a free exercise case for one to show the coercive effect of the enactment *as it operates against him in the practice of his religion.* . . . [A] violation of the Free Exercise Clause is predicated on coercion." (Emphasis added.) The Court quoted that language from *Schempp* in *Board of Education* v. *Allen,* 392 U.S. 236, 248-49 (1968), in rejecting the free exercise claim of the appellants in that case—a claim that was identical to that made by the appellees in this case.

The record in this case contains no evidence to show what religious beliefs, if any, are held by the appellees. See *McGowan* v. *Maryland,* 366 U.S. 420, 429 (1961). In addition, the appellees made no showing of how the operation of the challenged statute coerced them in the practice of whatever religion they may adhere to. The appellees alleged only compulsion in the taxing process, a redundancy, and they failed to prove that their re-

ligious beliefs or practices had in any way been coerced or interdicted.

The allegation that a government spending program constitutes compulsory taxation for religious purposes is nothing more than a classic statement of an Establishment Clause claim. See *Flast* v. *Cohen,* 392 U.S. 83, 103 (1968). Thus, because the appellees' Free Exercise Clause claim is only a restatement of their Establishment Clause claim, their free exercise claim must fail for the same reason that their Establishment Clause claim fails. For, as this brief has demonstrated at length, the Salary Supplement Act benefits only the secular educational processes in nonpublic elementary schools and does not support religious instruction or the religious functions of those schools.

CONCLUSION

For the several reasons stated above, the judgment of the District Court should be reversed.

December 24, 1970

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APPENDIX

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Public Regulation of Nonpublic Education in Rhode Island

Title 16, R. I. General Laws

Chapter 8—Federal Aid

§ 4—State Board of Education is empowered to conduct survey of school facilities, including presumably private schools, to evaluate need for federal construction aid.

§§ 7-13—State Department of Education administers federal funds provided for school lunch programs in public and private schools. The Department prescribes rules and regulations governing federally aided school lunch programs to which any school that agrees to participate in program is subject. Regulation includes (§ 11) "audits, inspections and administrative reviews of accounts, records and operations with respect to school lunch programs," as is necessary to assure compliance with Department regulations.

Chapter 12—Rights and Duties of Teachers Generally

§ 4—Every teacher in private school is required to maintain a register of pupils including name, sex, age, names of parents or guardians, time each enters and leaves the school, and daily attendance.

Chapter 19—Compulsory Attendance

§ 1—Children of prescribed ages are required to attend public school or "present a certificate made by or under the direction of the school committee of the city or town wherein he resides, setting forth that the child has attended for the required period of time a private day school or received instruction approved by the school committee . . . ."

§ 2—Private schools, to be approved by school committee for purpose of compulsory attendance laws, must meet

the following requirements: Establish period of attendance substantially equal to that maintained by public school; keep registry of pupils and report same to school committee, Superintendent of Schools, truant officers and State Department of Education; teach "reading, writing, geography, arithmetic, the history of the United States, the history of Rhode Island, and the principles of American government . . . in the English language substantially to the same extent as such subjects are required to be taught in the public schools, and . . . the teaching of the English language and of other subjects herein shall be thorough and efficient."

Chapter 20—Holidays and Days of Special Observance

§ 1—Certain days are declared as holidays and "no session of any school in this State shall be held on any one of said days."

§ 3—Certain other designated days "shall be especially observed with appropriate exercises in all the schools of this State."

[Section 4 of this Chapter refers specifically to public schools, suggesting that sections 1 and 3 are directed to private and public schools.]

Chapter 21—Health and Safety of Pupils

§ 3—State Board of Education promulgates lighting, heating, ventilating, seating and other sanitary standards applicable to "any committee of any body having charge of the erection, alteration, equipment or furnishing of any school building."

§ 4—Governing head of "every public school or private school" is responsible for instructing and training pupils for a prescribed number of fire drills. Failure to comply is a misdemeanor.

§ 5—Department of Education formulates uniform fire code or drill tactics and prescribes forms for reporting re-

sults of fire drills, applicable to public and private schools.

§ 7—Schools subject to compulsory attendance provisions (public and private primary and secondary schools) "shall have a school health program which shall be approved by the State Director of the Department of Health and the State Commissioner of Education."

§ 14—"Every students and teacher in a public or private school, college, or university participating in . . . [certain defined courses of study] shall be required to wear approved eye protection devices at all times while participating in such courses or laboratories."

Chapter 22—Curriculum

§§ 2-10—Prescribes curriculum for public schools which includes courses in history and government pertaining to the United States and Rhode Island, physiology and hygiene instruction, health and physical education, fire prevention, certain foreign languages if requested by a requisite number of pupils, uniform aptitude and intelligence testing and instruction on the use of voting machines. Section 2 states: "No private school or private instruction shall be approved for the purposes of Chapter 19 [compulsory attendance] of this title unless the course of study therein shall make provision for instruction substantially equivalent to that required by this Chapter for public schools."

Chapter 29—Americanization of Schools

§§ 7-8—Persons of ages 16 through 20 not literate in English are required to attend designated public schools or private schools "if the private instruction is approved by the school committee as substantially equivalent in content, method and the hours of instruction offered in public schools."

Chapter 37—State Scholarships

§ 26—State Board of Education is empowered to establish rules and regulations "for such reports, accounting, and statements" from the public or private institution of higher learning where a State scholarship recipient has applied his award. In addition, the institution is required to give the State Commissioner of Education notice when the recipient ceases to be a student in good standing, indicating such change of status and the reason therefor.

Chapter 38—Offenses Pertaining to Schools

§ 2—Pupils in public and private schools are required to be immunized against such diseases as the State Director of Health and Education designates, provided immunization is not contrary to beliefs.

§ 5—Questionnaire to any student that may constitute invasion of constitutional rights or privacy must be approved by Department of Education and local school committee.

§ 10—"Any school receiving aid from the State, either by direct grant or by exemption from taxation, may be visited by the school committee of the town in which such school is situated, and by the Board of Education or its duly authorized agents, whenever they shall deem it advisable."

§ 11—Refusal of school to permit visitation as authorized in section 10 or failure to keep school register or make returns as required by law results in forfeiture of its tax exemption.

Chapter 40—Private Schools

§ 1—All institutions of secondary or higher education before being established or incorporated must have "adequate faculty and educational facilities and equipment and

the proper maintenance thereof" approved by the State Board of Education.

§§ 2, 4—Authority of any educational institution to grant degrees must be specifically included in charter or articles of incorporation; otherwise such degrees are prohibited.

§ 5—Approval of Board of Education provided in section 1 may be revoked for cause.

§§ 8, 9—Penalties described for conferring degree without Board of Education approval of institution.

§ 11—Private schools "shall be registered at the Office of the Department of Education, said registry showing location, name, officers or persons in charge, grade of instruction, and a common language used in teaching. They shall also make a report annually in the month of July to the Board of Education, showing the number of different pupils enrolled, the average attendance, the number of teachers employed, and such other facts of age, attendance and subjects of instruction as said Board may require."

§ 12—With respect to private schools offering instruction to students above the compulsory school age, same requirements as in section 11 and, in addition, the registry to include information on the tuition rates and "the training and experience of the teachers" and the annual report to include "such other facts as the said Board [of Education] may require."

§ 14—Annual reports and registration not required (§§ 11, 12) of private schools "properly registered at the Office of the Department of Education and which have been approved by the Board of Education."

Chapter 48—Educational Services to Very Young Children

§ 2—Private pre-school facilities cannot operate unless "suitable provisions have been made to fulfill such minimum requirements of adequate faculty, health,

safety, sanitation, site, physical plant, educational program, and such other standards as may be established through rules and regulations promulgated by the Commissioner of Education," to whom application is made. Annual approval required.

§§ 3-6—Supporting administrative provisions concerning the grant of authority to the Commissioner to make necessary rules and regulations, enforcement responsibility, revocation of approval and penalties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island, *Appellants,*

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING and MARIE FRIEDEL, *Appellees.*

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

BRIEF OF APPELLANTS

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On Appeal From a Three-Judge United States District Court for the District of Rhode Island

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BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Rhode Island is reported at 316 F.Supp. 112 (1970). It is reprinted in full starting at page 28 of the Joint Appendix (J.A.).

JURISDICTION

The Judgment of the District Court was entered on June 17, 1970. J.A. 50-51. The appellants filed their Notice of Appeal in the District Court on June 26, 1970. J.A. 53-54. Probable jurisdiction was noted by this Court on November 9, 1970. The jurisdiction of this Court to hear this case on direct appeal is based upon 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

The Statute involved in this Appeal is a Rhode Island Statute entitled: "An Act Providing Salary Supplements to Non-Public School Teachers." (Rhode Island General Laws, Title 16, Chapter 51.) (Here-

inafter sometimes referred to as the Salary Supplement Act.)

The Statute is reprinted at J.A. 182.

QUESTION PRESENTED

Does the Rhode Island Salary Supplement Act violate the Establishment Clause of the First Amendment because teachers in parochial schools may qualify for and receive benefits under the Statute?

STATEMENT OF THE CASE

This action was brought by a group of individuals, each of whom is a resident citizen and taxpayer in the United States and in the State of Rhode Island, to enjoin the Commissioner of Education of the State of Rhode Island, the General Treasurer of the State of Rhode Island, and the Controller of the State of Rhode Island from making salary supplement payments to teachers in non-public elementary schools pursuant to C246 of the Rhode Island Public Laws of 1969, Rhode Island General Laws, Title 16, Chapter 51, commonly referred to as the Salary Supplement Act.

The complaint in substance alleges that the Act violates both the Establishment and Free Exercise Clauses of the First Amendment of the Constitution of the United States because it permits public funds to be used to supplement the salaries of certain teachers of secular subjects in non-public schools; that Catholic schools are the prime beneficiaries of the Act; that the purpose and primary effect of the Act is the advancement of religion, and prays that the Act be declared unconstitutional and that the defendants be

enjoined from making the payments authorized by the Act.

The legislative findings contained in the first section of the Act recite Rhode Island's long concern with the quality of the education provided for all of its youth; that the State had earlier provided legislation to partially finance the cost of public schools for local cities and town; that non-public schools by reason of accelerating costs were finding it extremely difficult to maintain the quality of education; that approximately twenty-five (25%) percent, or 45,000, of the total number of its students at the elementary level were being educated in non-public schools and that a crisis existed in non-public schools; that non-public schools were finding it increasingly difficult to maintain adequate salary scales and that

> ". . . . without adequate salary scales, no school can attract sufficient numbers of competent, dedicated teachers; and teachers are the prime factor in educational qualities."

The Salary Supplement Act, so-called, permits certain teachers in non-public elementary schools who meet the requirements of the Act to apply for and receive a supplement to their salary. The Act requires that a teacher to qualify for the salary supplement must be certified to teach by the State Board of Education; must teach in a non-public elementary school in which the per capita cost per pupil is no greater than the cost per pupil in a public elementary school; must teach only secular subjects to the same extent as taught in public schools; must use only teaching materials used in the public schools and must not teach a course in religion and signs a statement not to do

so during any period for which a salary supplement is received.

Under the Act payments must be made directly to the teacher and not through the agency of the school.

The amount of the authorized salary supplement is fifteen (15%) percent of the current salary which, including the supplement, is not in excess of the average maximum salary paid to public school teachers in the State.

No non-public school is required to come within the provisions of the Act.

No teacher in a non-public school is required to comply with the Act. Compliance for non-public schools and for non-public school teachers is purely voluntary.

The case was heard on the merits and substantial evidence in the form of oral testimony, depositions and documents was introduced.

The essence of the argument presented by the Appellees was that the Establishment Clause prohibits the use of any public funds which may indirectly benefit a parochial school because such schools have a religious atmosphere and any such indirect aid would have the effect of advancing religion.

The essence of the argument presented by the Appellants was that public funds may be used where the subsidized activity is purely secular, serves a public purpose and is consistent with the secular purpose of the Act.

The majority of the court below purported to apply the purpose and effect test developed in *Abington School District* v. *Schempp,* 374 U.S. 203, 223 (1960),

relied on in *Board of Education* v. *Allen,* 392 U.S. 236 at 245-247 (1968) and refined in *Walz* v. *Tax Commission of New York City,* 397 U.S. 664 (1970).

The court, however, felt that *Walz, supra,* modified the primary effect test of *Allen, supra,* by concluding that in determining the primary effect of a Statute it was only necessary to determine whether or not a Statute resulted in excessive entanglement between government and religion. Both the majority and the separate concurring Opinion concluded that while the Act had a primary secular purpose its end result was excessive entanglement between government and religion.

SUMMARY OF ARGUMENT

Appellants agree with the District Court's ruling that the Salary Supplement Act had a purely secular purpose. Appellants contend that the District Court was in error in its reading of the Decision in *Walz* v. *Tax Commission of New York City,* 397 U.S. 664 (1970), and further in error in its application of the proper constitutional test to the evidence in the instant case.

Appellants contend that the *Schempp, Allen, Walz* test to determine whether or not a State Statute violates the Establishment Clause of the First Amendment of the United States Constitution is a three-fold test; viz:

1. Is the purpose of the Statute secular?

2. Is the primary effect of the Statute to advance religion?

3. Is the primary effect of the Statute to inhibit religion?

A fair reading of the Statute and the application of the evidence to the test indicates conclusively that the Salary Supplement Act satisfies the constitutional safeguards required for Establishment Clause purposes.

ARGUMENT

I. THE RHODE ISLAND SALARY SUPPLEMENT ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

A. The Crisis Leading to the Statute

The presence before this Court of *Tilton, et al.* v. *Richardson,* No. 153, October Term, 1970, *Lemon, et al.* v. *Kurtzman,* No. 89, October Term, 1970, *Earley, et al.* v. *DiCenso,* No. 569, October Term, 1970, and *Robinson, et al.* v. *DiCenso,* No. 570, October Term, 1970, indicates the existing crisis in the field of non-public education.

The presence of these cases does more. It means that the crisis is felt throughout the country and at every level of government. It means that the State and Federal governments have responded to the crisis. It means most of all that this Court recognizes the crisis and is willing to come to grips with it.

The last quarter century has brought vast change to these United States. We entered the Nuclear age, we communicate with nations via satellite and men walk on the moon. Government presence in the fields of housing, employment and medical care has become immense. Government spending has increased fantastically. Taxes have increased in amount, in multiplicity and in complexity.

The change has been evidenced in all phases of living. Nowhere has the change been felt more keenly than in the field of education. The population ex-

ploded. More children meant more schools and more teachers. Scientific advances brought new learning. The new learning required new methods, new teachers, new equipment. The new teachers with the new methods are scarce, and the new equipment is sophisticated and expensive. Physical facilities are inadequate and expensive. The cost of education has ballooned.

The crisis in education has affected both public and non-public schools. Both have felt the affects of spiralling costs.

The response of both the State and Federal governments indicates dramatically the magnitude of the crisis. At the Federal level in messages to Congress, President Kennedy noted the crisis at the college and university level (H.R. Doc. No. 54, 88th Cong., 1st Sess. 7 (1963), and President Nixon noted it at the elementary and secondary school levels. (H.R. Doc. No. 267, 91st Cong., 2nd Sess. 9 (1970). In his message to Congress President Nixon said:

> "If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed four billion per year in operations with an estimated five billion more needed for facilities . . . [non-public elementary and secondary schools] have long been an integral part of the nation's educational establishment . . . supplementing our public school system. . . . . [those schools] provide . . . diversity . . . . [and] give a spur of competition to the public schools through which educational innovations come, both systems benefit and progress results. . . . . Private, elementary and secondary schools, most of them church supported . . . educate eleven (11%) percent of all pupils, close to six million school children. In the past two years close to a thousand non-public elementary and secondary schools closed and most of their dis-

> placed students enrolled in local public schools . . . these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. . . . This government cannot be indifferent to the potential collapse of such schools . . . in its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that non-public schools in America are closing at the rate of one a day."

The reaction of both Congress and the State Legislatures to the crisis has been the enactment of a great variety of legislation designed to afford aid to the non-public schools.

The volume and nature of legislation is a dramatic indication not only of the existence and extent of the crisis but of the consuming desire of both the states and the nation as a whole to preserve non-public education. The response of the State of Rhode Island was the enactment of its Salary Supplement Act which is now in question.

In the passage of this Act the Rhode Island legislature was very much aware of the nature of its problem. On the one hand, it recognized the probability of the loss of its non-public elementary schools which educate twenty-five (25%) percent of its children, and on the other hand, it recognized the Constitutional prohibition of ". . . an establishment of religion . . ." That the State was aware of the Constitutional prohibition is amply evidenced in the first section of the Act:

> "It is, therefore, the policy of the State of Rhode Island to provide a quality education for all Rhode

> Island youth, those in public and non-public schools alike; *within the limitations imposed by the Constitutions of the United States and of Rhode Island.*" (R.I.G.L. 16-51-1) (Emphasis added)

That a crisis existed in Rhode Island's non-public elementary schools was a clear-cut finding of the court below:

> "The evidence introduced at trial fully corroborates the legislature's findings of a financial crisis in non-public education . . ." (J.A. 32).

The Rhode Island Salary Supplement Act represents its legislature's efforts to save its non-public school without " . . . an establishment of religion . . . ".

B. The Constitutional Standards

In this area of interplay between state aid to non-public education and the establishment of religion, constitutional guidelines are becoming more distinct. The norm is as stated in *Walz* v. *Tax Commission,* 397 U.S. 664, 669:

> ". . . we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

All contact or involvement or entanglement between church and state is not prohibited. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The test that has emerged is the *purpose* and *primary effect* test developed in *Abington School District* v. *Schempp,* 374

U.S. 203, relied on in *Allen, supra,* and further developed in *Walz, supra.*

In *Allen, supra,* this Court has said

> ". . . to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S. at 243.

In *Walz, supra,* this Court stated:

> "Determining that the legislative *purpose* is not aimed at establishing, sponsoring or supporting religion does not end the inquiry, however. We must also be sure that the end result—*the effect* —is not an *excessive* government entanglement with religion. The test is inescapably one of degree." 397 U.S. at 674.

The test or standard that has emerged is three-fold, viz: (1) Is the purpose of the Statute secular? (2) Is the primary effect of the Statute the advancement of religion? (3) Is the primary effect of the Statute the inhibition of religion?

In the development of the *Schempp-Allen-Walz* test of secular purpose and primary effect this Court not only produced an eminently viable and practical formula but also one which echoed the wisdom of an earlier Court announced by Mr. Justice Holmes:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas and Tenn. Railroad* v. *May,* 194 U.S. 267, 270 (1904).

It is against this purpose and primary effect test that the Rhode Island Salary Supplement Act must be measured to determine whether or not it passes constitutional muster.

C. The Purpose of the Statute Is Secular

The purpose of the Rhode Island Salary Supplement Act is very clearly and very simply set forth in the first section of the Act. Its purpose is to provide ". . . a quality education for all Rhode Island youth, those in public and non-public schools alike. . . ." After reciting that approximately twenty-five (25%) percent of all elementary school children in Rhode Island are in non-public schools, it states that ". . . non-public schools are finding it increasingly difficult to maintain their traditional quality due to rising costs. This is particularly serious with regard to the salaries of teachers; without adequate salary scales, no school can attract sufficient numbers of competent dedicated teachers; and teachers are the prime factor in educational quality . . . in order to assist non-public schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality we hereby enact. . . ."

The quality of education is a legitimate legislative concern. *Board of Education* v. *Allen,* 392 U.S. at 245-247. The ". . . specific statement of primary purpose in the act governs." *Arizona* v. *California,* 283 U.S. 423, 456 (1931); see *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The transcript is devoid of evidence indicating a contrary purpose. The court below concluded after citing the purpose and effect test set forth in *Schempp, supra,* and relied on in *Allen, supra:*

> ". . . the Salary Supplement Act, in our opinion, was not intended to advance or interfere with re-

> ligion. The Statute itself recites that its purpose is 'to provide a quality education for all Rhode Island youth, those in public and non-public schools alike.' Certainly the quality of education in non-public schools is a legitimate legislative concern . . . we find nothing in the history and structure of the act which suggests that the legislative purpose was other than as declared." (J.A. 39)

It would seem clear that the purpose of the Act is secular and was not intended to advance or inhibit religion and hence meets the Constitutional standard of secular purpose required by the *Schempp-Allen-Walz* test.

D. The Primary Effect of the Statute Does Not Advance Religion

The court below refused to determine the "primary effect" of the Salary Supplement Act.

> ". . . the act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is 'the primary' effect, as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance." (J.A. 40)

The court below felt that *Walz, supra,* did away with the primary effect test of *Schempp* and *Allen* and concluded that the "degree of entanglement" determines whether the "primary effect" of the statute violates the Establishment Clause.

> "*Walz* thus makes it clear that the test of the statute's effect is not whether the secular result is more important than the religious result or

> whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards." (J.A. 42)

It is respectfully submitted that the court below misconstrued the *Walz* decision. *Walz* as read by your appellants adds a new dimension to the *Schempp-Allen* test. *Allen* was concerned with whether or not the statute in question had the effect of *advancing* religion.

> "Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of *aid* contravening the First Amendment." 397 U.S. at 672. (Emphasis added)

Walz was concerned with whether or not the statute in question had the effect of *inhibiting* religion.

> "New York in common with other states, has determined that certain entities that exist in harmonious relationship to the community at large and that foster its 'moral or mental improvement' should not be *inhibited* in their activities by property taxation." 397 U.S. at 672. (Emphasis added)

This court in *Walz* concluded that if the end result of the Statute was an excessive government entanglement with religion, then it would be felt to *inhibit* religion.

The test of whether the primary effect of a Statute *advances* or *inhibits* religion still prevails and has not been modified by *Walz* as thought by the court below. As earlier indicated in this brief, your appellants conceive the Establishment Clause test of the constitutionality of a Statute to be a three-fold analysis, viz:

(1) Is the purpose secular? (2) Is the primary effect to *advance* religion? (3) Is the primary effect to *inhibit* religion?

The secular purpose of the Salary Supplement Act has been earlier dealt with in this brief. For purposes of clarity and convenience this portion of the appellants brief will concern itself only with that portion of the primary effect test pertaining to the *advancement* of religion. The *inhibition* phase of the test will be treated separately.

Implicit in a determination of the "primary effect" of a statute is the concept that a statute may well produce multiple effects. The problem of determining which of several effects is *primary* may well be difficult but in passing upon the constitutionality of the Salary Supplement Act it was the duty of the court below to determine the Act's *primary* effect.

> ". . . it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution." *Walz, supra,* 397 U.S. at 679.

For Establishment Clause purposes, the guidelines for determining whether or not a State Statute with a secular purpose has the primary effect of advancing religion have been set. In *Allen, supra,* providing textbooks to students in parochial schools had the effect of aiding the church which sponsored the school, as well as having the effect of aiding secular education. One effect was clearly "secular" and one effect was clearly "religious". In determining which of these two effects was the primary effect for Establishment Clause purposes, this Court concluded that absent evidence of religious "permeation" the secular effect if

consistent with the Act's secular purpose would be considered the primary effect.

The court below found that the Salary Supplement Act had a purely secular purpose and

> ". . . two significant effects: on the one hand, it aids the quality of secular education; on the other it provides support to a religious enterprise." (J.A. 40)

This was precisely the situation facing this Court in *Allen, supra,* and the trial court should have made a determination of whether the secular or the religious effect was the primary effect for Establishment Clause purposes.

In making this determination of whether the secular or religious effect was primary, the court below should have based its conclusion on the evidence. It was not handicapped by a "meager" record as was this Court in *Allen, supra.* The record was ample. It had only to determine whether or not the public funds had the effect of supporting a purely secular activity or an activity permeated with religion. If the evidence indicated permeation, then the Statute's primary effect would be the advancement of religion. If the evidence indicated a purely secular activity, then the primary effect of the statute would be secular.

The court below made extensive findings of fact based upon substantial evidence in the form of depositions, documentary evidence and the oral testimony of an Associate Commissioner of Education for the State of Rhode Island, the Superintendent of Schools for the Archdiocese of Providence and several teachers in parochial schools eligible for aid under the statute. It also extensively reviewed the evidence.

The evidence indicated a ". . . financial crisis in non-public education . . ." stemming from ". . . the rapidly changing composition of their faculties." (J.A. 32); that Rhode Island's Catholic elementary schools are ". . . under the general supervision of the Bishop of Providence . . ."; that the ground rules for principals of those schools are set forth in a ". . . Handbook of School Regulations . . . frequently superseded either by informal directive or by common practice." (J.A. 34); that the keynote of education in a parochial school as reflected in the Handbook is ". . . the spirit and personality as well as the professional competence of the teacher . . ." (J.A. 35) The evidence further indicated that "this concern for religious values does not necessarily affect the content of secular subjects in diocesan schools"; that ". . . several teachers testified that they did not inject religion into their secular classes and that such testimony gained added credibility from the fact that several of the teachers were non-Catholics . . ."; and the Salary Supplement Act as well as the Rhode Island Textbook Loan laws required that the teaching materials be those approved for use in public schools. (J.A. 35)

The court noted that the evidence showed that parochial schools were usually located near the parish church; that there were religious symbols on the exterior and interior of buildings; that prayers were said and that religious vocations were encouraged; that it was advantageous to the church to have a curriculum which contained both religious and secular subjects; that the presence of Sisters provided a religious atmosphere; that while religion did not overtly intrude into all instruction the blend of secular and religious activity makes the parochial school a power-

ful vehicle for transmitting the Catholic faith to the next generation. (J.A. 35, 36) The court further noted:

> "It also seems clear to us that this essentially religious enterprise (*parochial schools*) cannot succeed without good teaching in secular subjects . . ." ". . . good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms." (J.A. 36, 37) (Italicized words added)

It is undoubtedly true that paying a part of the salary of teachers who teach secular subjects with secular materials in church schools indirectly aids

> ". . . that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools." 392 U.S. at 671.

But it is equally true that for Establishment Clause purposes all aid is not prohibited. As this Court said in *Walz* at 671-672:

> ". . . making textbooks available to pupils in parochial schools in common with public schools is surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost . . . was not seen as having a primary effect of aid contravening the First Amendment." *Board of Education* v. *Allen,* 392 U.S. 236 (1968).

The test of the constitutionality of this Act is not whether it provides "aid" to a religious school. The test is to determine whether its primary effect is to advance religion or advance education. The purpose of the Act is entirely secular. The Act had two effects:

one secular in that it aided education; the other that it indirectly aided parochial schools. If the secular effect carries out the Act's secular purpose and is not permeated with religion then the primary effect of the Act will be the advancement of education and not religion and will meet the constitutional requirements. The evidence in the record will be determinative. *Allen, supra,* at p. 248.

For purposes of determining whether this statute has the primary effect of *advancing religion* or *advancing education* the evidence is overwhelming.

The evidence stands alone and uncontradicted that the effect of the Act carried out its purpose. A significant improvement in the quality of teachers was its immediate effect. (J.A. 88) That the evidence indicated that parochial schools have religious symbols, represent a vehicle for transmitting a particular faith and that good secular teaching is an essential part of a religious enterprise, is not of itself critical to this inquiry.

This Court has long been aware that parochial schools pursue two goals.

> ". . . this court has long recognized that religious schools pursue two goals, religious instruction and secular education." *Allen, supra,* at p. 245.

What is critical to this inquiry is whether or not the evidence shows that the activity supported by public funds is permeated by religion.

The majority of the court below was overly modest in pointing out that

> ". . . this concern for religious values does not necessarily affect the content of secular subjects

> in diocesan schools . . . [or that] several teachers testified . . . they did not inject religion into their secular classes . . ." (J.A. 35)

Judge Pettine in his separate concurring Opinion was far more accurate.

> "I read *Allen* to invite the inquiry whether the state program under scrutiny has as its effect the advancement of a religion. In answering that inquiry it cannot be presumed that secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment. Only proof will establish that subsidization of an educational enterprise is subsidization of a 'religious enterprise.' In the instant case not only is *the record barren of any proof* that the teaching of secular subject matter is a 'religious enterprise', but also there is *unanimous unrebutted* testimony from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes." (J.A. 49) (Emphasis added)

The evidence is uncontradicted that the effect of the Act was to improve the quality of education which was its stated and proven purpose.

To paraphrase the language of this Court in *Allen, supra,* at page 248, there is nothing in the record to support the proposition that the teachers receiving the salary supplement under this Act are teaching religion or injecting religion into their teaching of a secular subject. All the evidence is to the contrary.

The primary effect of this Act as established by the evidence is the advancement of quality education and not the advancement of religion.

II. THE SALARY SUPPLEMENT ACT DOES NOT INVOLVE EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE

As earlier indicated in this brief your appellants read *Walz* to mean that even if the purpose of a Statute is secular and its primary effect does not *advance* religion it may still violate the First Amendment by *inhibiting* religion if its end result is an ". . . excessive government entanglement with religion". 397 U.S. at 674.

The court below held that the Salary Supplement Act resulted in excessive government entanglement with religion and thus violated the First Amendment.

While *Walz* makes it clear that *excessive* entanglement between government and religion is prohibited by the First Amendment, it also makes it clear that

> ". . . no perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one which seeks to mark boundaries to avoid excessive entanglement." 397 U.S. at 670.

The test is not one of entanglement between government and religion but rather one of *excessive* entanglement and such a test ". . . is inescapably one of degree." 397 U.S. at 674. It is on the *degree* of entanglement between church and state resulting from the Salary Supplement Act that attention must be focused to determine its constitutionality.

Private schools and parochial schools in particular have long been a part of the educational fabric of the United States. For an equally long period of time it has been recognized that such schools must meet the secular educational requirements as to the *quality* and nature of curriculum which the State has

power to impose. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Rhode Island, like its sister states, has long been concerned with the quality of the education of its people and the quality of education in private schools is a legitimate public concern. *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930). There can be little doubt that it is within the power of the state

> ". . . to insist that attendance at private schools . . . be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction." *Allen, supra,* 392 U.S. at 245-246.

The "entanglement" between the religious school and state control has been long and fruitful. *Allen, supra,* 392 U.S. at 247-48.

Rhode Island, like its sister states, has a myriad of "entanglements" with private schools. A parochial school's very existence is controlled by the state. No parochial school can exist without first being approved by the local School Committee. (Rhode Island General Laws, 1956 §§ 16-19-2 and 16-40-1) Its curriculum and attendance are regulated, and extensive reporting to public officials is required by Statute. (16-19-2) (16-22-2) Its participation in the school lunch program (16-8-7, 9, 11); the textbook program (16-23-2); and the bus program (16-21-2) are regulated by Statutes. Its physical facilities (16-21-3); its health programs (16-21-7) and its safety standards are all regulated. (16-21-4)

All of these laws require a more or less continuing administrative involvement or entanglement between parochial school authorities and the State.

Many of these laws require the exercise of a most delicate discretion on the part of government officials and parochial school authorities. Certainly the discretion exercised in determining that a parochial school may exist at all involves great discretion and potentially great entanglement. In reaching such a decision the local School Committee must make a "value" judgment that such school teaches subjects

> ". . . substantially to the same extent as such subjects are required to be taught in the public schools and that the teaching . . . shall be *thorough* and *efficient*; . . ." (16-19-2)

No one has seriously questioned the power of the State to create this potentially great entanglement between government and religion. No one has seriously questioned that such a law on its face creates an *excessive entanglement* which inhibits religion to a degree prohibited by the First Amendment.

This is equally true of the laws respecting such schools' curricula, physical facilities, safety programs, health programs, bussing, school lunches, compulsory attendance.

In Rhode Island, at least, the existence of most of these relationships or entanglements has been of long duration and totally free of any semblance of strife, both historically and in the record of this case.

Against this background we must test the Salary Supplement Act. Not to determine whether it results in an involvement or entanglement between the state and parochial education but rather to determine whether its end result is an *entanglement* with religion to a *degree* which in the "value" judgment of this

Court is felt to be excessive and thereby an *inhibition* of religion prohibited by the First Amendment.

The court below relying on *Walz* concluded that the Salary Supplement Act resulted in ". . . excessive government entanglement with religion . . ." (J.A. 45) This conclusion was based on two premises. The first premise was that under this Statute the

> ". . . Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is 'religious' and which 'secular'. This ongoing administrative relationship between government and the Catholic schools creates the possibility of legal disputes. (J.A. 43-44)

The second premise was

> ". . . equally important . . . this statute . . . *may* significantly limit the internal freedom of parochial schools." "Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prayed with his class lest he endanger his subsidy.
>
> "In this very case we have been forced to inquire into . . . whether religion 'permeates' the teaching of secular subjects . . . surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum." (J.A. 44) (Emphasis added)

These two premises on which the court below reached its conclusion of excessive entanglement can be fairly stated to be, first, that the Commissioner of Education must determine the amount spent on "secular" as opposed to "religious" education and, second, that

the Act limits the freedom of the parochial school to set its curriculum and the freedom of parochial school teachers to teach religion. In considering the validity of these two premises we must look to the Act and look to the evidence.

The court's first premise results from the fact that under the Act otherwise qualified teachers can apply for a salary supplement *only* if they teach in a non-public school. The Act defines a non-public school to be

> ". . . any school not operated for profit other than a public school . . . except . . . schools whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools . . . as determined by the Commissioner of Education." (16-51-2)

The trial court concluded that this language required that the Commissioner of Education *monitor* parochial school expenditures and in close cases determine which spending is "religious" and which "secular" and that this produced an ongoing administrative relationship between church and state which creates in the words of the court the *possibility* of legal disputes. The court had earlier voiced a concern for determining which expenses are "religious" and which "secular" when it said:

> ". . . sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." (J.A. 41)

This reference to *sophisticated* bookkeeping permitting the bulk of a parochial school's expenses being

assigned to "secular" activities is totally irrelevant to this inquiry and entirely misleading. Under the Act in question the exact opposite would have to occur. The bulk of an institution's expenses would have to be assigned to "religious" activities or the per student cost of "secular" education in a parochial school would exceed the per student cost of the public school and thereby disqualify the teacher in such school from receiving the supplement.

The lower court's conclusion that the Act requires the "monitoring" of a parochial school's expenditures, if not erroneous, is, at least, unfortunate. It implies a week-to-week or month-to-month surveillance. The determination to be made under this Act is *annual.* Teachers are hired on an *annual* basis. The so-called ongoing administrative relationship between church and state referred to by the court below is an annual one. In this regard it is a no more frequent or more ongoing relationship than that created by the laws pertaining to compulsory attendance and curriculum and far less than that created by the laws pertaining to the health, safety, busses and lunches. To that extent the *degree* of entanglement created by this Act is modest.

The Act does require that the Commissioner of Education determine the cost of "secular" education. The cost of "secular" education is well known to the staff of the Commissioner of Education in Rhode Island. The State has long paid to its cities and towns a percentage of their operating costs of education and accounting methods and procedures for determining costs are well established. (Rhode Island General Laws §§ 16-7-1 through 47). The annual per student cost of education is published annually. (PROVIDENCE JOURNAL

BULLETIN Almanac 1970 at page 169). When it is also noted that present laws regulate to a great extent the number of school days and the quality, quantity and content of the private school's curriculum the area for potential dispute as to cost is narrow indeed.

It is of importance to note that the Commissioner of Education is not required to make a *determination* of cost in *every* case. Only if the total per student cost of both the "secular" and "religious" education exceeds the public school per student cost is a determination necessary. If the private school per student cost for both "secular" and "religious" education is *equal to or less* than that of the public school no determination is necessary.

Looking then to the Act in its actual operation the Commissioner of Education has only once had to inquire as to the allocation of expenses and there is no indication of any more such future determinations. The court below found:

> "To date this final breakdown into secular and religious expenses has proved necessary in only one case. Only two non-public schools have reported expenditures in excess of the statutory norm, and teachers at one of these schools failed to apply for aid, thus obviating the need for further inquiry." (J.A. 31-32)

Based on the evidence and this finding the first premise on which the court based its conclusion that the determination of the per student cost of secular education resulted in "monitoring" parochial school expenditures, created an "ongoing" administrative relationship and the *possibility* of legal disputes to a *degree* constituting excessive entanglement is totally without foundation.

There is no reason either in the record of this case or otherwise to assume that either the parochial school Administrator or the Commissioner of Education will not honestly administer this Act or that the Commissioner with competent accounting advice cannot readily resolve any religious-secular expense question that may "possibly" arise in the future by appropriate regulation.

The first premise of the court below lacks support in the evidence, experience and in probability.

The second premise on which the court below based its conclusion of "excessive entanglement" was that this Statute

> "... *may* ... significantly limit the internal freedom of parochial schools ... already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prayed with his class lest he endanger his subsidy ... In this very case we have been forced to inquire ... into whether religion 'permeates' the teaching of secular subjects ... surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their curriculum." (J.A. 44)

It is obvious from the foregoing that the lower court read this Act as imposing a limitation on the freedom of parochial schools to set their curriculum and the freedom of teachers in these schools to teach religion.

Relative to the curriculum it is worthy to note that the court used the word "may". There is absolutely no evidence that parochial schools have altered their curriculum so as to comply with the Act. There is no

evidence that any parochial school person felt that this Act imposed any such limitation on its curriculum. There is not even a hint in the evidence that this Act will require or result in a change of curriculum. Having in mind the compulsory curriculum required presently by Rhode Island law, any alteration of curriculum could only be of a minor nature even if it were imposed.

Looking to the Act itself it is immediately apparent that the Act is completely voluntary. It is directly concerned with teachers and only indirectly with schools. The relationships resulting from the Act are between teachers and the Commissioner of Education. The school is involved only to the extent that its per student cost for secular education is equal to or less than such cost in a public school. There is nothing in the Act which requires a school to tailor its expenses to qualify under the Act. There is nothing in the Act which requires a school to hire only teachers who will not teach religion or inject it into secular subject matter. There is nothing in the Act which requires the school to qualify at all. The school is left entirely free to set its own curriculum and to hire its own teachers.

There is absolutely nothing contained in the Act itself and nothing in the evidence which indicates the slightest restriction on the curriculum of a parochial school.

The Salary Supplement Act does impose a "restriction" on a participating teacher. Such a teacher cannot teach religion while receiving benefits under the Act. This is the only "restriction" it contains. Contracts to teach in a parochial school are made as they always have been; between the teacher and the school

authority. No teacher is required to teach in a parochial school. No teacher in a parochial school is prevented from teaching religion. No teacher in a parochial school is required, even if otherwise qualified, to apply for a salary supplement. Both the qualifying for and the applying for the salary supplement is completely voluntary and unrestricted.

The "restriction" imposed by the Act is simple and reasonable. If a teacher in a qualified school wishes to receive the Act's benefits he must teach a subject as taught and with the materials used in a public school and must sign a statement not to teach a course in religion while receiving the supplement.

A fair reading of the Act as it applies to teachers indicates that it does not contain "restrictions" but rather *conditions*. No one need come under the Act. The decision to comply with the Act is the free and independent choice of each individual teacher.

In noting that the evidence showed that one teacher had stopped praying with his class and that some otherwise qualified teachers had stopped teaching religion the court below was identifying the tree and not the forest. It failed to realize that these teachers had *voluntarily* chosen to do this. They were not *required* to do this. In considering the Act in its operating effect on teachers it should have shown a greater concern that the evidence in the record had the immediate effect of having more *quality* teachers applying for positions and that several of the teachers who testified were teachers in Roman Catholic schools who were themselves not Roman Catholics.

There is no support in a fair reading of the Act or in the evidence that a parochial school's curriculum is

"restricted" or that a parochial school teacher is "restricted" by this Act.

Both premises on which the court below based its conclusion of excessive entanglement are entirely unsupported by the Act itself, by the evidence and by reasonable probability. The degree of involvement between church and state arising under this Act is minimal; the Act imposes no restriction on the religious freedom of a parochial school to set its curriculum or on a parochial school teacher to teach religion.

There is no "excessive entanglement" between government and religion created by the Salary Supplement Act.

III. THE RHODE ISLAND SALARY SUPPLEMENT ACT DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

In their complaint Appellees allege that the Salary Supplement Act amounted to

> "... compulsory taxation for the support of religion or religious educational institutions." (Complaint, ¶ 21, J.A. 8, 20-21)

The District Court rejected this claim because Appellees

> "... failed to introduce the kind of particularized evidence necessary ... to support this allegation." (J.A. 37-38)

The transcript was void of any evidence to show that the Appellees practiced any religion let alone that they were coerced in the practice of a religion. Such a show of coercion is necessary to establish a violation

of the free exercise clause. *Abington School District* v. *Schempp,* 374 U.S. 203-223 (1960).

In addition to this the evidence clearly establishes that the Salary Supplement Act has the primary effect of benefiting the quality of education in non-public elementary schools.

CONCLUSION

The Rhode Island Salary Supplement Act has the secular purpose of aiding secular education, a primary effect of aiding secular education does not result in excessive entanglement between government and religion and coerces no one.

The decision of the District Court must be reversed.

Respectfully submitted,

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December 8, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. McELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Appellants,

v.

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE*

INTEREST OF AMICUS

Protestants and Other Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with national headquarters in the Washington, D.C. area, with some 100,000 members in all the States of the United States. Its sole chartered purpose is to preserve the principle of

separation of church and state as set forth in the First Amendment to the Constitution of the United States and in the Constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Protestants and Other Americans United for Separation of Church and State, popularly known as "Americans United" has members in the State of Rhode Island and is especially concerned over any development in the state which raise questions of possible infringements of the Constitution of the State of Rhode Island but, more particularly, any possible violations of the religious clauses of the First Amendment to the Constitution of the United States.

This *amicus* brief takes the position that Chapter 246 of the Public Laws of the State of Rhode Island (1969) entitled "An Act providing salary supplements to non-public school teachers" is unconstitutional. This position is not motivated by any hostility to any particular church or to any particular religion. As the Maryland Court of Appeals said in the *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966):

> "It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

Our task is to advise the court as objectively and fairly as possible as to the law applicable to a determination of the constitutionality of the "Salary Supplement" levy involved, with particular attention to the strictures of the First Amendment.

STATUTE INVOLVED

The statutory provision involved in this suit is a Rhode Island statute entitled "An Act Providing Salary Supple-

ments to Nonpublic School Teachers," R.I. Gen. Laws chap. 16-51 (referred to herein as the Salary Supplement Act).

QUESTIONS PRESENTED

Is Rhode Island's Salary Supplement Act, which provides state funds for the use of church schools in supplementing teachers' salaries, unconstitutional as violative of the Establishment Clause of the First Amendment, as applied to the State through the Fourteenth Amendment, because the Act: (1) uses church schools as instrumentalities or agents to carry out an alleged secular purpose or program of the state—namely, the education of church school students in secular subjects; (2) has a primary effect (among others) of advancing or inhibiting religion by channeling the resources of the state to church educational activities; and (3) results in a "reciprocal embroilment of government and religion which the First Amendment was meant to avoid"?

STATEMENT OF THE CASE

On May 16, 1969, the Governor of the State of Rhode Island approved an Act which became effective July 1, 1969, entitled, "An Act providing salary supplements to non-public school teachers . . ." (Chap. 246 of the Public Laws of the State of Rhode Island (1969)). The Act authorized payment by Rhode Island of a salary supplement to teachers in church schools in the amount of 15% of their salaries. This was to be carried out under regulations of the Rhode Island Commissioner of Education. Funds were appropriated out of the general treasury of the State of Rhode Island. As of December 10, 1969, approximately 200 teachers on the staff of church schools had applied to the Commissioner of Education for the salary supplement.

In December of 1969, six Rhode Island Taxpayers, two of whom had children in the public schools, initiated

a complaint in the United States District Court for the District of Rhode Island challenging the Rhode Island statute granting salary supplements to church schoolteachers. The defendants named were the state's Commissioner of Education, General Treasurer and Comptroller. Certain lay teachers in Catholic schools were allowed to intervene. The teachers had all applied for state salary supplements. On February 13, 1970, Judge Raymond J. Pettine issued a temporary order restraining the state officials from making the initial salary payments to the church schoolteachers. These payments would have amounted to close to $70,000 for some 156 teachers in 51 Catholic schools.

On June 15, 1970, a three-judge panel of the District Court of the United States for the District of Rhode Island held that the plaintiffs were entitled to a declaratory judgment that Rhode Island's Salary Supplement Act (R.I. Public Laws c. 246 (1969)) violates the First Amendment of the United States Constitution insofar as it authorizes aid to teachers employed by denominational schools, and to an injunction forbidding defendants and their agents from making disbursements to such teachers.

SUMMARY OF ARGUMENT

The District Court's ruling that the Salary Supplement Act contravenes the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the State of Rhode Island by the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296 (1940)) is clearly correct. The recent decision in *Walz v. Tax Commission*, 397 U.S. 664 (1970), added a measuring device to other tests of constitutionality previously described in *Everson v. Board of Education*, 330 U.S. 1 (1947), *Abington School District v. Schempp*, 374 U.S. 203 (1963), and *McGowan v. Maryland*, 366 U.S. 410 (1961).

The new measure of constitutionality is whether the government involvement with church affairs or religion "is

excessive and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement" (*Walz*, p. 675).

If the facts of a particular case show that the administration of an Act requires continuing surveillance by and entanglement of the government with a church, such an Act is unconstitutional. The court below found such administrative involvement inherent in the Salary Supplement Act. It further found that a primary effect of the Act was to inhibit religion by significantly limiting the internal freedom of parochial schools (*DiCenso*, p. 121). The court stated:

> "In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment. *Accord, Opinion of the Justices*, 261 A.2d 58 (Me. Jan. 15, 1970." (*DiCenso*, p. 122)

Amicus argues further that the Rhode Island Salary Supplement Act not only creates "an impermissible degree of entanglement" between the church and state (cf. *Walz*, supra) but blatantly uses church organizations as "agents" to help carry out a broad education program of the State of Rhode Island. Amicus contends that there is no constitutional power in the State of Rhode Island to use churches to carry out any of its responsibilities, educational or otherwise, where nonreligious means are reasonably available, *McGowan v. State of Maryland*, 366 U.S. 420 (1961). Not only is there no power, but the Establishment Clause of the First Amendment of the Constitution (now applicable to the states) has been interpreted to forbid such "agency" relationship with its inherent "involvement" or "entanglement" of church and state (cf. *Walz*, supra).

ARGUMENT

The case here before the court is but one of a series involving an interpretation of the meaning and applicability of that provision in the First Amendment which reads: "Congress shall make no law respecting an establishment of religion. . . ." This court used the Fourteenth Amendment to extend this prohibition to the state legislatures: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;– nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." (*Cantwell v. Connecticut*, supra). For a long period, few whose religious liberties or whose immunity from coerced support of churches or religion were inhibited by a state statute, had standing to seek redress of their grievances in a federal court (*Frothingham v. Mellon*, 262 U.S. 447 (1923)). Since the opinion in *Flast v. Cohen*, 392 U.S. 83 (1968), numerous such grievances have been brought to this court's attention.

Two additional cases await argument in this court, *Tilton v. Richardson* (No. 153, October Term 1970) and *Lemon v. Kurtzman* (No. 89, October Term 1970); both involve the general principles which will govern this case. There are several other important cases on the way which will be similarly affected by whatever clarification the court can give to the meaning of the First Amendment–*Rita Johnson v. William J. Sanders*, decided October 14, 1970 by a three-judge panel of the United States District Court (District of Connecticut), *Americans United v. Independent School District*, decided November 19, 1969, presently on appeal from the Supreme Court of Minnesota to this court (No. 934, October Term, 1970), and *Board of Education of the County of Kanawha v. Hughes* (No. 517, October Term 1970) on appeal from the Supreme Court of Appeals of West Virginia. Also pending, by the filing of a Jurisdictional Statement, is *Kervick v. Clayton* (No. 852, October Term 1970) on appeal from the Supreme Court of New Jersey.

Amicus supports the position that an unconstitutional invasion of the individual's right to be free of religious establishment is present in *Lemon, Tilton, Johnson, Americans United v. School District* and *Americans United v. United States,* but not in *Kervick.* As our youngsters learn in the new math—here the "universe" is a set of statutes involving some sort of favorable relation between the church and state (favorable from the point of view of the church) one set consists of those statutes which are permissible under the First Amendment and the other those which are impermissible.

Trailing behind these cases are others that are under consideration in the lower courts which may or may not be appealed to this court—for example, *Protestants and Other Americans United v. United States,* decided December 16, 1970 in the United States Court of Appeals for the Sixth Circuit (a copy of the Opinion is included in the Appendix hereto). All have to do with the First Amendment and religious liberty and any opinion in one case should be consistent with the holdings in the others. Since Amicus has been involved in one way or another in all these cases and more, it is difficult to advise this court in this case without reference to how an opinion will fit across the board. It would be convenient not to know anything about these other cases, but they do exist. They invite an interpretation of the First Amendment which will bring an over-all harmony to the constitutional law of church-state relations.

DiCenso here involves a statute under which the State of Rhode Island purports to use taxpayer funds to supplement the salaries of teachers of secular subjects in church schools. We do not raise any question as to whether the legislators were motivated by the possibility of sectarian church support for their re-election in return for this favor. Like the District Court, we are careful to distinguish between the "motive" behind the legislation and the "purpose" of the Act. This court generally avoids making enquiries into the motives behind any particular legislation. Such an inquiry, unless it be in connection with obviously ill-motivated legis-

lation, is beyond the resources of any court. In *McGowan v. Maryland*, 366 U.S. 420 (1961), Justice Frankfurter observed: "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing.

On the other hand, the "purpose" of legislation may be determined and, in the field of church-state relations, *must* be determined. Most statutes, including Rhode Island's Salary Supplement Act, have several purposes simultaneously. If one of the statutory purposes is to aid religion, or to assist churches in their activities, the First Amendment to the federal constitution prohibits such a purpose (*McGowan v. Maryland*, 366 U.S. 420 (1961)). The "effect" of a piece of legislation is even more important than its "purpose" for the "best laid plans of mice and men gang aft aglae." This is particularly true in modern government where the complexities are such that many legislative acts are not only counterproductive but even if constitutional in purpose end up unconstitutional in effect. That is doubly the case here—also in *Lemon* and in *Tilton*.

At all times it helps to keep in mind as well the "purpose and primary effect" of the religious clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (One of the results of the Civil War was that these clauses, which were originally only a restraint upon Congress, were extended to limit the power of state legislatures. *School District of Abington Township v. Schempp*, 374 U.S. 203, and cases cited therein; *Murdock v. Pennsylvania*, 319 U.S. 105, 108; *Everson v. Board of Education*, 330 U.S. 1; *Illinois ex rel. McCollum v. Board of Education*, 33 U.S. 203, 210-211; *Zorach v. Clauson*, 343 U.S. 306; *McGowan v. Maryland*, 366 U.S. 420; *Torcaso v. Watkins*, 367 U.S. 488; and *Engel v. Vitale*, 370 U.S. 421.) These two restrictive clauses create one of the most important of civil rights—namely, the "free exercise of religion" which may not now be invaded by either the State governments or by the Federal government to which the First Amendment

originally addressed itself. Justice Black in *Gideon v. Wainwright*, 372 U.S. 335 (1963), stated: "Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, *religion*, assembly, association, and petition for redress of grievances" (p. 341). In *McGowan v. State of Maryland*, 366 U.S. 420 (1961), Justice Frankfurter reminded in his separate opinion: "The general principles of church-state separation were found to be included in the Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of 'liberty' protected by the clause" (p. 460).

In all three cases, *Lemon*, *Tilton*, and *DiCenso*, *amicus* takes the position that the religious clauses of the First Amendment prohibit the use of taxpayer funds to implement any plan or procedure whereby the church is to be used as an instrumentality or agency of the state to carry out any purpose, no matter how secular the purpose or effect of the statute or administrative regulation involved.

(a) In *DiCenso*, the Salary Supplement Act of the Rhode Island legislature uses taxpayer funds to pay part of the salaries of church schoolteachers and thus joins the state with the church to carry out an allegedly "secular" purpose of the State of Rhode Island. The church schools involved pay part and the state pays part of these teachers' salaries to carry out their respective "secular" purposes. By this merging of resources the State of Rhode Island attempts to use the facilities and teachers of the Roman Catholic school system (and others) to carry out a "secular" government program.

(b) In *Lemon*, the Nonpublic Elementary and Secondary Education Act of the Pennsylvania legislature uses state funds to contract for "secular educational services" from church schools—the same services which are already available from the state school system of the Commonwealth. Those who cherish religious education have persuaded the

state legislature to use church schools as an agency of the state to perform a secular educational function.

(c) In *Tilton*, the Higher Education Facilities Act of the United States uses taxpayer funds for the construction of buildings at undergraduate church colleges, again for use in the teaching of "secular" subjects.

All three statutes employ religion as an engine of civil policy decried by James Madison in his *Memorial and Remonstrance* where he pointed out: "We remonstrate against the said Bill, . . . because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world; *The second an unhallowed perversion of the means of salvation*" (emphasis supplied). Who can be so blind as not to see that Rhode Island's "Salary Supplement Act" is an attempt to employ religion as an engine of civil policy and results in an unhallowed perversion of the means of salvation. Madison made the further point: "Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not." (Writings of James Madison (Hunt Ed.), Vol. II, pp. 183-191.)

One of the reasons why there is any legal question at all in this type of case is because of a misunderstanding of the Supreme Court's holding in *Board of Education v. Allen*, 392 U.S. 236 (1968), the dicta of which appears to condone the governmental financing of church schools, particularly the secular aspects of such education. The Supreme Court observed in *Allen*, supra, at 247-48:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about

> the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

Now it is true that church schools have undertaken the task of secular education, and some claim to be doing so almost to the exclusion of religion. If this invasion of the field of religion by the government is allowed to continue, the payment of church personnel by the government for secular activities may so divert churches from their religious functions as to completely destroy religion. This, of course, was one of the results of the mixture of church and state which Madison and most of the commentators have subsequently feared. This, too, the doctrine of separation of church and state was intended to prevent.

If we review the statute in the *Allen* case, we quickly see that the books were to be furnished to the students and not to the churches. While close to the line, this Court in *Allen* did not have a case where, without equivocation, the aid was to the church. Nor was the church school made an instrumentality to carry out a "secular" purpose of the government. If, as a matter of fact, the aid is to the student and not to the church school, and if the authority used to carry out the secular purpose of the government does not make the church school substantially an agent of the government (the *de minimis* doctrine makes this test practicable) there is no problem. And this is what we believe *Allen* was all about—and this is what happened in *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the

parents were reimbursed not the school; the parents were the agents of the government; the bus lines and passengers were benefitted, not the churches; and, finally, a secular purpose of the government, the safe transportation of children, was accomplished.

In *Tilton*, the District Court applying the "purpose and primary effect" test associated with both *Everson* and *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), came up with an erroneous test for the constitutionality of a statute claimed to infringe the religious clauses of the First Amendment: "The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid" (*Allen*, p. 1198). Thus interpreted, the Establishment Clause would permit the government, state or federal, to assist church schools and to use church schools to carry out the educational responsibilities of the state, provided only that the particular courses taught were secular and not religiously oriented. Referring to the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1964), which grants federal funds to church-related colleges for construction of academic facilities, the District Court in *Tilton* stated: "The Act before us was carefully drafted to insure that grants made to church-related educational institutions would subsidize the secular rather than the religious functions of such institutions" (*Allen*, p. 1199).

It does not take any great cerebration to realize that a pandora's box of religious strife will be opened if this new erosion of the principle of separation of church and state is permitted to undermine the foundation of the First Amendment. Any conceivable secular activity or function of a present-day church could be subsidized at taxpayer expense if it is the nature of the function rather than the nature of the institution which is the test for avoidance of the principle of separation of church and state.

In effect, the rationale of *Tilton* and the other lower court opinions have changed the holdings in *Allen* into

a constitutional credit card for state and federal use of taxpayer funds to finance the secular activities of churches. But this distortion has been stopped cold by the Sixth Circuit Court of Appeals in *Protestants and Other Americans United v. United States*, decided December 16, 1970. The Circuit Court held:

> "The only question, therefore, for us to decide is whether the District Court was correct in ruling that the constitutionality of the Act was resolved in *Allen*.
>
> "In *Allen* the Supreme Court upheld a state statute which authorized the lending of secular text books to children irrespective of whether they attended public or private (parochial) schools. The Court applied the test stated in Abington School Dist. v. Schempp, 374 U.S. 203 (1963):
>
> > "'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' Id. at 222.
>
> "*Allen* followed *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which upheld the constitutionality of a state statute providing for the free busing of school children to public as well as parochial schools.
>
> "In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection, sewage facilities, streets and sidewalks.
>
> "Title II of the Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools

> for use by the children and the teachers. While the statute contains safeguards intended to insure the the purchase of secular books and materials only, there is still a question whether this constitutes forbidden involvements of the state with religion. It can be argued also that the loaning of libraries to sectarian schools frees the use of funds for religious purposes, that is, funds which otherwise would be used for library maintenance." (Slip opinion, p. 2.)
>
> ". . . In our opinion, the additional step in the present case, namely, the loaning of library books and materials directly to the parochial schools, rather than the issuing of textbooks directly to the school children, together with the issue of whether the involvement required in applying the safeguards of the Act is minimal and remote, present substantial questions which were not resolved in *Allen*, and which require the convening of a three-judge District Court for determination." (Slip opinion, p. 3.)

The Sixth Circuit Court has re-emphasized the clear language of Justice White who delivered the opinion of this court in *Allen:*

> "the law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically in the State. Thus no funds or books are furnished to parochial schools and the financial benefit is to the parent and children not to the schools." (392 U.S. 263 (1968).)

This clarification of *Allen* casts doubts on the propriety of using *Allen* and *Everson* as precedents to permit taxpayer funds to support the secular educational activities of churches. With this false path blocked off, this Court can serve one of the original purposes of the establishment clause, namely, prohibit any use of churches by the State to carry out the secular functions of the State where independent means would suffice.

This court now has an unique opportunity to sweep out the legal cobwebs which have been accumulating in the constitutional law of church-state relations. One of these cobwebs is the concept that it is the function and not the institution aided which determines constitutionality. This error should be spiked in its coffin like a latter-day Dracula. Otherwise, it will haunt the law of church and state for years to come. The misreading of *Everson* and *Allen* to permit state aid to churches—provided the function assisted is secular—has caused the churches to make a Herculean effort to squeeze themselves into the Procrustean bed of secularism to qualify for state aid. In *Murray v. Comptroller of the State of Maryland,* 216 A.2d 897 (1966), the Supreme Court of Maryland highlighted this secularization of the churches:

> ". . . today, religious organizations, as a major part of their functions, carry on activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities. Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services." (P. 407.)
>
> ". . . There is, today, a generally recognized reason, entirely secular in nature, for the state to encourage the building and maintenance of houses of worship. Such edifices and the activities carried on therein, may well be deemed to attract persons to communities and to tend to increase the general tax assessment base. Real estate developers are donating sites to churches in their planned communities as part of the efforts to attract purchasers." (P. 908.)

If the devil has a sense of humor, he will laugh at those who labor to merge church and state so that the church is degraded to the status of a device to profit real estate promoters.

This court has a new opportunity to clarify the meaning of the religious clauses of the First Amendment and provide suitable tests to determine whether a particular statute involves a church-state constitutional question. The great language in *Everson*, supra, can be reiterated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (Emphasis supplied.)

This rule or test obviously covers a great many different situations where the government acts: (1) so as to set up a church; (2) aids one particular religion; (3) aids all religions or religions in general; (4) prefers one religion over another; (5) requires a person to go to church; (6) requires a person to stay away from church; (7) forces a person to profess a belief or disbelief in any religion; (8) punishes a person for entertaining or professing religious beliefs or disbeliefs; (9) punishes a person for church attendance or non-attendance; (10) uses tax funds to support religious activities; (11) uses tax funds to support religious institutions which practice or teach religion; (12) becomes involved or participates in the affairs of religious groups; (13) or permits churches to participate in state affairs, as "churches."

This court can formalize the rule devised by Justice Brennan, set forth in his concurring opinion in *Walz*, supra, which, as he states, gives "concrete meaning" to the Establishment Clause:

> ". . . the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understand- of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) *use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government.* On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not, in my judgment, be deemed to violate the Establishment Caluse." (p. 680.) (Emphasis supplied.)

The "purpose and primary effect" test can also be made more useful while limiting that use to situations *where there is a question as to the meaning of a statute—not the meaning of the First Amendment.* This test was fashioned in *Everson, Zorach, McGowan* and *Schempp* and was reiterated in *Allen*:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative

> power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education*, 374 U.S. at 222." (P. 243)

Finally, there is another test *which looks to the statute rather than to the meaning of the First Amendment.* This is the "involvement test" authored by Chief Justice Burger in *Walz.* This test was carefully and correctly used by the court below in testing the constitutionality of the Rhode Island Salary Supplement Act here under consideration. The court quotes the Chief Justice:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . (*Walz*, p. 675)

There must be a caveat in the use of this test. It is not applicable in every case. There will be many instances where there are direct grants of federal and state funds to churches or for the propagation of religion where there will be no involvement at all—no strings attached. The churches will be busy as beavers working with state legislatures removing all the safeguards on the use of tax funds for their educational and welfare activities—particularly those which require continuing surveillance to see how the funds are actually being used. This certainly was not the Chief Justice's intent.

Let us pause from these explanations and tests to concentrate on what the whole business is about—religious liberty, peaceful coexistence between church and state, sectarian cooperation, the avoidance of bloodshed and strife.

freedom of mankind to progress both materially and spiritually. Let us recall the threats to religious liberty which prompted Madison and Jefferson to insist on the inclusion of these safeguards in the constitution. So many Justices of this court have reviewed the dangers which prompted the adopted principle of the separation of church and state that it is difficult to pick just one. Justice Douglas recently put it neatly in *Engel v. Vitale*, 370 U.S. 421 (1962):

> "There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. . . . The great condition of religious liberty is that it be maintained free from sustenance as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting . . . . Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. . . . It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms . . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissentions."

The purpose of the religious clauses of the First Amendment has been to achieve the religious freedom which we all now enjoy in this nation; and let us rejoice, to continue the paraphrase of the test in Schempp, that the primary effect of this court's guardianship of the principle of separation of church and state has been the religious peace and absence of sectarian violence which we do not enjoy in other arenas of our social life today.

CONCLUSION

The Opinion and the Judgment of the court below should should be affirmed.

Respectfully submitted,

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
Amicus Curiae

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January 20, 1971

APPENDIX

No. 20270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ET AL., *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*	APPEAL from United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed December 16, 1970.

Before WEICK, EDWARDS and PECK, Circuit Judges.

WEICK, Circuit Judge. This appeal is from an order of the District Court granting summary judgment in favor of the defendants and dismissing the complaint, as amended.

The action in the District Court was brought under the Civil Rights Act (42 U.S.C. § 1983) to enjoin enforcement of Title II of the Elementary and Secondary Education Act of 1965, Public Law 89-10, 79 Stat. 36, 20 U.S.C. § 821-27, which authorizes federal grants for library and instructional materials for use of pupils and teachers in public and private (including parochial) schools.

Plaintiffs prayed that a three-judge court be convened, that an injunction be granted restraining enforcement of the Act, and sought a declaratory judgment that the statute is unconstitutional in violation of the Establishment Clause in the First Amendment to the Constitution of the United

States; and further prayed for the return of $14,606.02 to the United States by the Treasurer of the State of Ohio and the Superintendent of the Dayton School District, which sum was alleged to have been distributed to twenty-two parochial schools in the Dayton City School District for the purchase of books and materials; and further prayed for damages in the amount of $5,000.00.

In a prior appeal, in an unreported order, we held that the plaintiffs had standing to sue on the authority of *Flast v. Cohen*, 392 U.S. 83 (1968).

The District Court, in a memorandum opinion and order, declined to convene a three-judge court and granted summary judgment in favor of the defendants on the ground that the issues of the case were controlled by the decision of the Supreme Court in *Board of Educa. v. Allen*, 392 U.S. 236 (1968).

Where an injunction is sought to restrain the enforcement of a state or federal statute on the ground of violation of the Constitution of the United States, the District Court is required to convene a three-judge court under the provisions of either 28 U.S.C. § 2281 or § 2282, unless no substantial federal constitutional claim is presented or it is patently frivolous. *Bailey v. Patterson*, 369 U.S. 1 (1962); *Turner v. Memphis*, 369 U.S. 350 (1962); Ex Parte Poresky, 290 U.S. 30, 31 (1933); *Jones v. Branigin*, ___ F.2d ___ (Case No. 20,482, 6th Cir. 1970).

The claim would be deemed unsubstantial if, as the District Court held, the Supreme Court had passed upon the precise question involved in the present case.

The only question, therefore, for us to decide is whether the District Court was correct in ruling that the constitutionality of the Act was resolved in *Allen*.

In *Allen* the Supreme Court upheld a state statute which authorized the lending of secular text books to children irrespective of whether they attended public or private (parochial) schools. The Court applied the test stated in

Abington School Dist. v. Schempp, 374 U.S. 203 (1963):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id. at 222.

Allen followed *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which upheld the constitutionality of a state statute providing for the free busing of school children to public as well as parochial schools.

In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection, sewage facilities, streets and sidewalks.

Title II of the Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools for use by the children and the teachers. While the statute contains safeguards intended to insure the purchase of secular books and materials only, there is still a question whether this constitutes forbidden involvements of the state with religion. It can be argued also that the loaning of libraries to sectarian schools frees the use of funds for religious purposes, that is, funds which otherwise would be used for library maintenance.

The District Court did not have the benefit of the recent decision of the Supreme Court in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). The Court there held that state tax exemptions of properties used solely for religious purposes

did not violate the Establishment Clause as it was not aimed at establishing or supporting religion, but simply spared the exercise of religion from the burden of property taxation levied on private profit institutions. The Court was of the view that the exemption created only a minimal and remote involvement between church and state, an involvement much less than the taxation of the churches would entail. The test is essentially one of degree.

In discussing the important subject of involvement, Chief Justice Burger, who wrote the opinion for the court, stated:

> "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation." 397 U.S. at 675.

The decisions of the Supreme Court construing the Free Exercise and Establishment Clauses of the First Amendment have drawn fine distinctions and have laid down rules not easy to apply. They have been decisions by divided courts.

In our opinion, the additional step in the present case, namely, the loaning of library books and materials directly to the parochial schools, rather than the issuing of textbooks directly to the school children, together with the issue of whether the involvement required in applying the safeguards of the Act is minimal and remote, present sub-

stantial questions which were not resolved in Allen, and which require the convening of a three-judge District Court for determination.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

FILE COPY

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. McELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Appellants,

—v.—

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island,

Appellants,

—v.—

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Appellants,

—v.—

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island,

Appellants,

—v.—

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF APPELLEES

Question Presented

Does a statute subsidizing the operations of parochial schools violate the First Amendment to the Federal Constitution notwithstanding the fact that the subsidy is earmarked to supplement the salaries of teachers teaching only subjects taught in public schools and who promise not to teach a course in religion while the salary supplement payments are in effect?[1]

Statement of the Case

Responding to pleas by Catholic parochial school authorities concerning the financial plight of their educational system, the Rhode Island legislature enacted the Rhode Island Non-Public School Salary Supplements Act. (R. I. General Laws, Title 16, Chapter 51.) The statute as originally introduced (J.A. 178-182) would have encompassed all non-public schools but was amended before it was enacted. Appellees contend that the purpose of the amendment was to limit its coverage to the parochial school system, but whether or not this was the purpose it was indeed its effect for it is conceded that none but teachers in Catholic parochial schools have qualified under the statute as enacted.[2]

Individual citizens and taxpayers of Rhode Island brought suit in the United States District Court for the District of Rhode Island challenging the constitutionality

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[1] It is to be noted that the teachers are not required to promise not to interject religion in the courses they do teach. As will be indicated below (p. 34) the Synodal law of the Diocese, adherence to which is mandatory on all teachers (J.A. 72), in fact requires them to inject religion in all their teaching.

[2] The point is discussed further *infra* pp. 15-16.

of the statute under the Establishment and Free Exercise Clauses of the First Amendment. A number of teachers in the parochial school system and parents of children attending those schools were permitted to intervene as defendants and their counsel participated actively in the proceedings.

After a trial in which substantial documentary and oral evidence was introduced, the District Court ruled unanimously that the challenged statute was unconstitutional under the Establishment Clause. Two members of the Court held it unconstitutional under both the purpose-effect test as formulated in *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) and applied in *Board of Education* v. *Allen,* 392 U.S. 236 (1968) and the entanglement test as formulated and applied in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970). The third member held the law to be unconstitutional only under the latter test.

Summary of Argument

A number of tests have been suggested for the application of the Establishment Clause to governmental financing of religious schools. These include (1) the no-subsidy test announced in *Everson* v. *Board of Education,* 330 U.S. 1 (1947); (2) the purpose-effect test of *Schempp-Allen;* (3) the entanglement test of *Walz;* (4) the secular means and end test suggested by Mr. Justice Brennan in his concurring opinions in *Allen* and *Walz;* (5) the test of time and place suggested in the opinions of the Court and of Mr. Justice Brennan in *Walz;* and (6) the balancing test suggested in the Court's opinion in *Allen.*

The no-subsidy test of *Everson* has never been expressly or impliedly abandoned by this Court; its authority remains unimpaired by any subsequent decision of the Court. Under that test the challenged statute is unconstitutional since in substance if not in form it constitutes a direct subsidy to churches for the operation of their religious schools, and it is constitutionally immaterial that the subsidy is earmarked for payment of salaries of teachers of so-called secular subjects.

In applying the purpose-effect test, a statement of purpose, at least in respect to state statutes, does not foreclose this Court from examining into the actual legislative purpose. In such examination, the Court may and should consider the legislative history of the statute and the historical circumstances of its adoption. This history establishes conclusively that the purpose of the challenged statute was to insure the continued operations of parochial schools. Since these schools teach and practice religion, the purpose of the statute is necessarily to advance religion.

Irrespective of purpose, a primary effect of the statute is to advance religion. This is clearly established by the record in this case—a record absent in *Allen*. That record shows that religion is so much part of the purpose, life and meaning of the parochial school system that governmental financing of it in whole or in part necessarily has the effect of advancing religion.

It is impossible to uphold the validity of the challenged statute under the entanglement test. Unless the state officials rely exclusively on the promise of the teachers not to teach religious subjects, and upon their constitutional but unpromised obligation not to introduce religion into the subjects they do teach—a reliance which would con-

stitute an abandonment of official responsibility—the statute requires that deep involvement and continued surveillance of religious affairs which the *Walz* decision holds impermissible under the Establishment Clause.

Under the secular means test, there is no evidence or reason to believe that the secular end sought to be advanced by the state cannot be effectuated without use of what the District Court called the "religious enterprise" of the parochial school system. The evidence establishes and the District Court found that the statute will impose increasing financial burdens on the state's educational budget, burdens which in time can exceed or at least not be less than involved in expanding the public school system to care for all children who wish to attend. In any event, the fact that secular means may be more expensive than religious ones does not justify disregard of the Establishment Clause.

Unlike tax exemption for churches, which goes back to the founding of the Republic and prevails in the Federal Government and in every state of the Union, subsidization of the salaries of parochial school teachers is a recent innovation. With the exception of sharply divided decisions in two recent cases, it has been held unconstitutional by every court which passed on the question. Other devices to subsidize the operations of parochial schools have uniformly been held unconstitutional by the state courts.

While under the balancing test the Court may consider the value of nonpublic schools in providing a secular education to children, the Court should also consider the negative effects of such schools. Paramount among these is the effect upon racial segregation in our public school

system. Statistical and other judicially noticeable evidence shows that nonpublic schools, including parochial schools, are increasingly being utilized by parents who seek an escape for their children from the influx of children of minority races into the public schools.

ARGUMENT

I.

The *Everson* test: subsidization.

In *Everson,* the Court said (and with this, of course, the minority concurred): "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." (330 U.S. at 17.) It stated further that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." This was hardly a radical concept; financial support of religion was always recognized as a form and perhaps the most obvious form of establishment.[3] It is because of this principle that practically every state in the Union, either by express constitutional provision,

[3] In *Flast* v. *Cohen,* 392 U.S. 83, 98 (1968) the Court speaks of "such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." In *Walz,* the Court stated that "The grant of tax exemption is not sponsorship since the government does not transfer part of its revenue to churches • • •." 90 S. Ct. at 1415.

statute or judicial decision, has forbidden use of tax-raised funds to finance the operations of sectarian schools.[4]

Nevertheless, appellants appear to assume that either the Court did not mean what it said in *Everson* or that what it said has been so impaired by subsequent decisions that it is no longer viable. This, we submit, is erroneous. Nothing this Court has said or held since *Everson* impairs the validity of its basic principle or indicates any intent to abandon or modify the test therein stated.

The argument supporting this assertion has been set forth in the brief of the appellants in *Tilton* v. *Richardson*, No. 153, October Term, 1970, and of the American Association of School Administrators and other public education agencies and organizations as *amici curiae* in *Lemon* v. *Kurtzman*, No. 89, October Term, 1970. To avoid unnecessary repetition we incorporate herein and respectfully refer the Court to pp. 15-27 of the former brief and pp. 14-23 of the latter brief.[5] Here we note only that it is of course within the power of this Court to repudiate the *Everson* principle, but if that is the Court's intent it should do so in clear and unambiguous language. We repeat here only our quotation from Chief Justice Marshall's opinion in *United States* v. *Burr*, 4 Cranch 470, 482 (1807):

> [A]n opinion which is to overrule all former precedents and to establish a principle never before recog-

[4] See *infra* pp. 50-51. Even in *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, cert. den., appeal dismissed, 385 U.S. 97 (1966), the Maryland court's exclusive reliance on the First Amendment was based on the fact that only colleges and not elementary and secondary schools were involved.

[5] Copies of these briefs have been served upon opposing counsel.

> nized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. • • • General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect • • •.

If we are correct in our assertion that *Everson* is still the law of the land, the present statute cannot stand. To adjudge the statute as providing aid to some teachers but not subsidizing the operations of the schools they teach in would be elevating form over substance and substituting fiction for actuality. That the purpose and effect of the statute is to subsidize the parochial schools is clear from its legislative history, express statements therein, the operation of the statute as revealed by the record at the trial, the arguments of counsel, and the opinions of the District Court, both majority and concurring.

The legislative history of the statute shows (as the intervenor appellants concede)[6] that it was enacted not in response to the financial needs of teachers but to the "plight of nonpublic schools" (J.A. 65-66). The statute speaks of the role of schools in educating Rhode Island youth, of their difficulty in maintaining traditional quality due to rising costs and of the need "to assist nonpublic schools" (J.A. 183). The expressed purpose of the statute is to provide funds to enable nonpublic schools to compete with public schools in purchasing the services of qualified teachers. This is no less a subsidization of the parochial schools than grants of Federal funds to enable domestic industries to compete with foreign imports is a subsidization of those industries.

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[6] Brief, p. 4.

The parochial school authorities were in no doubt as to who was the real beneficiary of the statute, as appears from the testimony of Father Edward W. K. Mullen, Superintendent of Schools for the Diocese of Providence:

> Judge Coffin: Did you say earlier that this bill, if it be held invalid, that you would not be able to offer more than $6,000 as a starting salary?
>
> The Witness: Yes.
>
> Judge Coffin: But in 1969 and 1970 you did offer $6,000. Is this including funds that the bill provided for?
>
> The Witness: No, we offered $6,000. We contracted for it certainly hoping that *we would get 15 per cent from the state, but we are committed to the $6,000 whether or not we get it.*
>
> Mr. Collins: We may have some further evidence on that, Your Honors, that might do violence to that answer.[7]
>
> Judge Pettine: The maximum of six thousand is what you can offer if the court should find it unconstitutional?
>
> The Witness: Yes.
>
> Mr. Collins: That is for next year, Your Honor. For next year.
>
> Judge Pettine: What are they paying this year?
>
> The Witness: They are paying six thousand. Could I explain that a little, please?
>
> Judge Pettine: Yes.
>
> The Witness: Well, we offered $6,000 this year, and we hoped that the bill would pass, although we made

[7] No further evidence was offered that did "violence to that answer."

commitments to the $6,000 bill and it had not passed, so we are committed at $6,000 this year. If the Court finds the bill unconstitutional and we know that *we will have to pay the entire committed salary for the future,* then we won't be able to offer more than $6,000, because we will in addition to the problem there, the great majority of the parishes are going to have to hire at least one more lay teacher next year than they have this year, and some parishes two or three.

Judge Pettine: That other $6,000 that is now being paid, Father, is the parish paid $5100 of that?

The Witness: Well, pending the decisions of this Court.

Judge Pettine: I'm just wondering where the other $900 is going to come from.

The Witness: *Well, it will have to come from the parishes.*

Judge Coffin: Assume the bill is held constitutional, then the parish would pay $5100 and the subsidy will amount to nine?

The Witness: Yes, sir. (J.A. 91-92. Emphasis added. See also J.A. 23.)

Counsel for the State of Rhode Island speaks of "legislation designed to afford aid to the non-public schools" (Brief, p. 9), and of "the legislature's efforts to save its non-public schools." (*Ibid.,* p. 10.) Counsel for the intervenor-appellants stresses the "plight of the nonpublic schools" and of their "financial problems" as the reasons for the enactment of the statute (Brief, p. 4). Their defense of the statute is based on the contention that "government can constitutionally subsidize the secular educational functions performed by church-related schools." (*Ibid.,* p. 7.)

The majority of the court below bases its decision on the premise that "the Establishment Clause values can be preserved only by denial of direct subsidies to parochial schools" (J.A. 47). The concurring opinion speaks of the "support of the secular educational processes of sectarian schools" (J.A. 50).

These instances can be multiplied manifold. They all point to the same conclusion: that the challenged statute seeks to subsidize the operations of parochial schools rather than provide benefits to teachers as individuals. This conclusion is fortified by the fact that the statute determines eligibility not on the basis of the needs of the teacher but of the school. Thus it conditions eligibility on the teacher's receipt of "a salary which, including the salary supplement, meets the minimum salary standards for public schools." If the beneficiary of the statute were the teacher rather than the school, it would seem that on the contrary the teachers most deserving of state aid would be those whose salaries do not reach the public school minimum. We know of no other statute under which individuals are punished by denial of state benefits by reason of the niggardliness of their employers.[8]

None of the courts which have considered the validity, either under Federal or state constitutions, of statutes similar to the one challenged herein have viewed them as anything but a subsidization of the operations of the schools.

---

[8] The District Court suggests that "the restriction of aid to schools whose per pupil expenditures does not exceed that of the public schools " * * * serves the legitimate secular purpose of saving state funds by eliminating schools which can afford well qualified teachers" (J.A. 40). This may be so, but it remains a case of penalizing the teacher for the niggardliness of the school in fixing teachers' salaries.

Opinion of the Justices, 261 A.2d 58 (Me. 1970); *Opinion of the Justices,* —— Mass. ——, May 11, 1970; *Johnson* v. *Sanders,* —— F. Supp. ——, U.S. District Court for the District of Connecticut, October 15, 1970; *Seegers* v. *Parker,* —— La. ——, Supreme Court of Louisiana, October 20, 1970. Even the two courts which did uphold the constitutionality of such statutes, *Lemon* v. *Kurtzman,* 310 F. Supp. 35 (1969), probable jurisdiction noted, 397 U.S. 1034 (1970) and *Matter of Legislature's Request,* —— Mich. ——, Michigan Supreme Court, October 5, 1970, did not base their decisions on the assumption that the statutory subsidy was to the teachers rather than to the schools.

If, as we contend, the subsidy is to the school and not to the teachers, we submit that for the reasons stated in the decision of the court below (J.A. 40-41) and discussed further below (pp. 21-38), the fact that the statute earmarks the subsidy for payment of salaries of teachers of secular subjects does not immunize it from invalidation under the *Everson* principle. Constitutional barriers cannot be evaded by sophisticated bookkeeping procedures.

II.

Schempp-Allen: purpose and effect.

The defense of the challenged statute herein (as in *Lemon* and *Tilton*) rests almost exclusively on the purpose-effect test announced in *Schempp.*[9] The majority of the District Court applied this test and reached a contrary result, but the appellants contend that it misunderstood or misapplied the test. We submit that if the test requires validation of statutes such as the present one, then it is not a test for the application of the Establishment Clause but for its substantial nullification. It is our position that whether viewed from the point of purpose or effect, the statute is unconstitutional.

A. *Purpose*

Initially, we urge that the Federal courts are not foreclosed from themselves determining the actual purpose of a state statute by reason of the statement of purpose contained therein. Whatever may be the rule in the case of a Congressional statement of purpose, in view of the respect due to a coordinate branch of government, to hold that a statement of secular purpose in a state statute forecloses further inquiry would render meaningless the requirement that the legislative purpose be in fact secular; a ritual incantation would suffice to exorcise the spectre of unconstitutionality.

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[9] Interestingly, the test has been applied in three cases, *Schempp, Allen* and *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968). In two of the three cases (*Schempp and Epperson*) it was used not to uphold but to strike down laws aiding religious teaching or practices.

Prefacing an enactment for financial support of religious teaching with a statement of secular purpose is hardly new; it goes back to what may be deemed the progenitor of the instant statute and all similar ones—the Virginia Bill Establishing a Provision for Teachers of the Christian Religion, the defeat of which, as the Court recognized in *Everson,* was part of the legislative history of the Establishment and Free Exercise Clauses. The opening paragraph of that Bill read:

> Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;
>
> *Be it therefore enacted by the General Assembly,* • • • (330 U.S. at 72).

This recitation of exclusively secular purposes did not prevent Madison from calling the Bill what it was, a Religious Assessment, and hence a law respecting an establishment of religion and prohibiting its free exercise.

The duty of the Court to search out the actual facts was recognized in *Evans* v. *Abney,* 90 S. Ct. 628 (1970), wherein the Court said (at 633):

> No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated.

In searching out the true purpose of a statute and in judging whether it is secular, the courts must consider its legislative history. This was stated by the Court in *McGowan* v. *Maryland,* 366 U.S. 420, 453 (1961):

> • • • We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, *in conjunction with its legislative history,* or in its operative effect—is to use the State's coercive power to aid religion. (Emphasis added.)

We submit that the legislative history of the statute herein shows clearly that it had only one purpose, and that was to relieve the financial plight of the state's parochial school system by providing financial support for its operations (J.A. 66). As we will show shortly, the salary-supplements mechanism is but one in a great variety of devices being employed to appropriate tax-raised funds for the support of sectarian schools in the face of the recognized unconstitutionality of a direct grant of public funds to such schools.

There is evidence to support a conclusion that the statute was tailored to apply only to the parochial schools. As

the District Court noted, the financial crisis upon which the legislature based its action "is largely confined to Rhode Island's Catholic schools" (J.A. 32; 60-62). These schools enroll approximately 95% of the children attending nonpublic schools (*ibid.*), but the legislature nevertheless amended the measure so as effectively to exclude from its coverage, at least up to the time of trial, all but Catholic nonpublic schools (J.A. 98-100). But whatever the case may be, it is hardly open to question that the parochial schools were the primary beneficiaries of the act and were intended to be so.[10]

In the search for "fact and truth" (*Evans* v. *Abney, supra*), the courts are not limited to the immediate legislative history in the narrow sense of that term, but may and should consider the historical context of the statute. Mr. Justice Brennan pointed this out in his opinion in *Adickes* v. *S. H. Kress & Co.*, 90 S. Ct. 1598, 1623 (1970):

> A legislative or constitutional provision need not be considered in isolation, but may be examined "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Reitman* v. *Mulkey*, 387 U.S. 369, at 373 (1967).

The application of this principle to the Establishment Clause was exemplified in *Epperson* where the Court invalidated under that Clause a state statute forbidding the teaching of evolution in the public schools. The statute itself made no mention of religion or the Bible. Neverthe-

[10] Intervenor-appellants concede as much (see Brief, p. 41, fn. 36), although they naturally designate the beneficiaries as the teachers in those schools rather than the schools themselves.

less, the Court found that the statute came out of the same historical context that spawned the Tennessee "monkey law" which gave rise to the famous Scopes trial and found that the actual purpose of the law was to protect fundamentalist sectarian doctrine from impairment by public school teachers.

Mr. Justice Brennan's resort to "historical context" in *Adickes* and the Court's resort to it in *Reitman* as well as in the decisions cited by the Court in *Reitman* to support its use of historical context, indicate that the guaranty of equality in the Fourteenth Amendment would be little more than a parchment barrier were the Court to close its eyes to history. That history is in large measure a chronicle of efforts to evade the mandate of the Amendment, a sort of historic chess game in which the moves are limited only by the ingenuity of lawyers in devising such gambits as "grandfather clauses," white primaries, gerrymandering, literacy tests, poll taxes, zoning laws, racial restrictive covenants, "separate but equal," tuition grants to private "academies," lease of municipal facilities to private corporations, etc., etc.[11]

The history of efforts to obtain tax-raised funds for sectarian schools in the face of Federal and state constitu-

[11] To take the area of voting as an illustration, the chess game would go something like this:

White	*Black*
Grandfather clause	Guinn v. U. S., check
white primary	Smith v. Allwright, check
"Jaybird Party"	Terry v. Adams, check
gerrymandering	Gomillion v. Lightfoot, check
poll tax	Harper v. Virginia Board of Elections, check

At the present writing, checkmate does not yet appear to be in sight.

tional barriers is remarkably similar. Perhaps the earliest experiment was the so-called Faribault plan, originating in Faribault, Minn.[12] There, the parochial schools experiencing a financial crisis (not unlike that which now faces the Rhode Island Catholic school system and which has been faced and been overcome by all Catholic parochial school systems since their establishment towards the middle of the last century) were incorporated into the public school system enabling them to receive tax funds without relinquishing ecclesiastical control or changing the character of their operations. The Faribault plan spread rapidly over most of the midwest, but with one exception[13] has been held unconstitutional by every court to which it has been presented.[14]

Next came free textbooks,[15] followed by bus transportation.[16] These, however, provided only tangential benefits to parochial schools, although together with free lunches and similar welfare services for children attending nonpublic schools, they represented the limits of the demands

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[12] See, L. Pfeffer, *Church, State and Freedom*, 538 (1967).

[13] *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940).

[14] E.g., *Zellers* v. *Huff*, 55 N.M. 501 (1951); *Berghorn* v. *Reorganized School District No. 8*, 364 Mo. 121 (1954). The earlier cases are cited and discussed in *Note*, "Catholic Schools and Public Money," 50 *Yale L.J.* 917 (1941).

[15] Upheld in *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930) and *Allen*, but invalidated in *Smith* v. *Donahue*, 202 App. Div. (N.Y.) 656 (1922); *Zellers* v. *Huff*, *supra*, and *Dickman* v. *Oregon School District*, 366 P.2d 533, *cert. denied*, 371 U.S. 823 (1962).

[16] Upheld in *Everson* and a number of state cases; invalidated in other state cases. See L. Pfeffer, *Church, State and Freedom*, 562-563, 570-571 (1967).

of parochial school authorities up to the late fifties.[17] The sixties witnessed a host of multifarious new demands upon state legislatures and sympathetic responses thereto by the legislatures. These included grants for construction,[18] auxiliary services,[19] shared time or dual enrollment,[20] tuition,[21] purchase of secular teaching services and salary supplements,[22] record keeping expenses,[23] and assignment of public school teachers for service in sectarian schools,[24] etc., etc.

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[17] See statement of Cardinal Spellman that the Church does not "expect public funds to pay for the construction and repair of parochial school buildings or for the support of teachers, or for other maintenance costs," since that would be unconstitutional, but only for "auxiliary services" of transportation, non-religious textbooks and health aids. New York *Times*, August 6, 1949. To the same effect, see N. G. McCluskey, *Catholic Viewpoint on Education*, p. 168 (1959).

[18] Invalidated in *Horace Mann League* v. *Board of Public Works, supra.*

[19] Challenged in *Wolman* v. *Rhodes*, Court of Common Pleas, Franklin County, Ohio, May 10, 1968; *O'Hare* v. *Detroit Board of Education*, United States District Court for the Eastern District of Michigan, Civ. No. 27899.

[20] Invalidated in *Special District* v. *Wheeler*, 408 S.W.2d 60 (Mo. Supreme Court, 1966).

[21] Invalidated in *Opinion of the Justices*, —— Mass. ——, June 4, 1970; *Swart* v. *South Burlington*, 122 Vt. 177, cert. denied, 366 U.S. 925 (1961).

[22] Invalidated in *Opinion of the Justices*, 261 A.2d 58 (Me., 1970); *Opinion of the Justices*, —— Mass. —— (May 11, 1970); *DiCenso* v. *Robinson*, 316 F. Supp. 112 (1970); *Johnson* v. *Sanders*, U. S. District Court for the District of Connecticut, October 15, 1970; *Seegers* v. *Parker*, —— La. —— (La. Supreme Court, October 20, 1970). Upheld in *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (1969) and *Matter of Legislature's Request*, —— Mich. —— (October 5, 1970).

[23] Challenged in *Committee for Public Education* v. *Rockefeller*, U.S.D.C. for the Southern District of New York, 70 Civ. 3251.

[24] Invalidated in *State ex rel. Chambers* v. *School District No. 10*, —— Mont. —— (July 28, 1970). Challenged in *Fisher* v. *School District No. 1*, Clackamas, Oregon, Circuit Court, January 14, 1970; *Citizens to Advance Public Education* v. *Porter*, Ingham County, Michigan, Circuit Court, December 18, 1969.

This history of efforts to obtain tax raised funds for the support of sectarian schools is paralleled in Rhode Island. First came bus transportation (R. I. Gen. Laws 16-21-2); in 1963 came free textbooks (Laws of 1963, ch. 12; R. I. Gen. Laws 16-23-2); the Salary Supplements Statute followed in 1969. It may safely be assumed that no matter how this appeal is decided, the Salary Supplement Law will not be the last chapter in the state's history of efforts to obtain financing of parochial school operations. (See, J.A. 41.)

In analogizing the legislative efforts to obtain public funds for the support of sectarian schools to efforts to maintain racial discrimination and segregation, we have no intention of impugning the motives of the numerous state legislatures which have enacted funding laws. We have no doubt that they believed deeply that such funding was necessary for the preservation of the nation's religious schools, and that such preservation was in the national interest and in the interest of the people of the respective states.

Nor do we have any intention of impugning in the slightest the motives of those who have pressed for the enactment of these laws. Anyone having cursory familiarity with the history of America's parochial school system cannot be unaware of the courage of the Catholic church leaders and the Catholic community in resisting popular and legislative efforts to destroy it;[25] nor of the heavy financial sacrifices voluntarily made by them and which

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[25] See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The law invalidated in that case was initiated at a time when Ku Klux Klan elements were particularly active and influential in the state. See, G. Myers, *History of Bigotry in the United States*, 293 (1943).

continue to be made by them for more than a century in order to sustain the religious schools. And it should also be remembered that the establishment of the parochial school system as a place of refuge for Catholic children was practically made necessary by the evangelical zeal and anti-Catholic bigotry of many public school officials and teachers.[26]

Nevertheless, if, as the intervenor-appellants assert (Brief, p. 41), illicit motives do not render unconstitutional a statute otherwise constitutional, neither do noble motives make constitutional a statute otherwise unconstitutional. The First Amendment is no less part of our Constitution than is the Fourteenth, and if the historical context of laws challenged as violative of the latter amendment is relevant evidence in determining their purpose, the same is no less true in respect to laws challenged under the former. This evidence, we submit, establishes conclusively that the purpose of the Rhode Island Salary Supplements Law is to finance the operations of parochial schools. A law so purposed, we submit further, violates the First Amendment no matter what test is used.

B. *Effect*

Allen, upon which the appellants place practically their sole reliance, unlike the present case did not involve subsidization,[27] but in addition did not present a record upon

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[26] See L. Pfeffer, *Church, State and Freedom,* 436-444 (1967); M. Williams, *The Shadow of the Pope, passim* (1932).

[27] This was noted by the United States Court of Appeals for the Sixth Circuit in *Protestants and Other Americans United* v. *United States,* decided December 16, 1970:

> *Allen* followed *Everson* v. *Board of Educ.,* 330 U.S. 1 (1947), which upheld the constitutionality of a state statute

which the Court could find a primary effect that advanced religion. The present case does present such a record and it was on that record that the District Court determined the Rhode Island statute to be unconstitutional even under the purpose-effect test. The following analysis of the record shows that it fully supports the Court's determination. (A similar factual analysis was used by the courts in *Zellers* v. *Huff, supra; Berghorn* v. *Reorganized School District No. 8, supra,* and the many other cases holding unconstitutional the use of public funds to pay the salaries of teachers in parochial schools.)

1. *The Background of the Parochial School System*[28]

The origin of the Catholic parochial school system in the United States is found in the canon adopted by the First Provincial Council of Baltimore in 1829, which stated:

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providing for the free busing of school children to public as well as parochial schools.

In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection.

Title II of the [Elementary and Secondary Education] Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools for use by the children and the teachers. * * *

[28] Technically, this is not part of the record but we believe it is judicially noticeable. Mr. Justice Jackson noted it in his dissenting opinion in *Everson*. So, too, did the Supreme Court of Montana in *State ex rel. Chambers* v. *School District No. 10, supra.* Moreover, the intervenor-appellants refer in their Brief (p. 4, footnote 3) to the nationwide crisis of religious schools, although there is nothing in the Record to substantiate it, presumably because it is judicially noticeable. If the financial problems of the Rhode Island parochial schools "are only a microcosm of a nationwide crisis," it is reasonable to assume that the Rhode Island parochial schools are only a microcosm of a nationwide system.

> We judge it absolutely necessary that schools should be established in which the young may be taught the principles of faith and morality, while being instructed in letters.[29]

However, it was the Third Plenary Council held in 1884 that firmly established the parochial school system in enacting the following statute:

> 1. Near each church, where it does not yet exist, a parochial school is to be erected within two years from the promulgation of this Council, and it is to be maintained *in perpetuum,* unless the bishop, on account of grave difficulties, judges that a postponement be allowed.[30]

This statute has never been rescinded or modified and the requirement that every Catholic parish church have a parochial school appended to it remains part of the canon law of the Church. As a result, the Catholic parochial school is today practically as pervasive in the United States as is the Catholic parish. What Justice Jackson said in his dissent in *Everson* is substantially true today notwithstanding the difficulties faced by the parochial school system both because of rising costs and the decline of religious orders. Justice Jackson said (330 U.S. at 24):

> I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to

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[29] J. A. Burns, *The Catholic School System in the United States,* p. 249 (1908).

[30] J. A. Burns, *The Growth and Development of the Catholic System in the United States,* p. 195 (1912).

> the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education for the young and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to the Church school is indistinguishable to me from rendering the same aid to the Church itself.

This was recognized by the Court in its statement in *Walz* (90 S. Ct. at 1412-1413) that religious groups "maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body would deny this is an affirmative if not dominant policy of church schools."

2. *The Structure of the Parochial School System in Rhode Island*

The parish school is as integrated into the Catholic Church system of Rhode Island as is the parish church, subject to the same philosophy, discipline and doctrine. The head of the system is the head of the Church, the Ordinary, or Bishop of Providence. His approval of the Handbook of School Regulations now in effect has "the force of synodal law in the diocese" (J.A. 191) and is "binding with respect to the administration and operation of the schools" (J.A. 72).

Direct responsibility for the supervision of the school system rests with the Diocesan School Board. The canon law of the diocese provides that "The Diocesan School Board * * * shall supervise the education, both spiritual *and secular,* in the parochial schools and diocesan high

schools" (J.A. 196).[31] The Board, however, "is the agency of the Ordinary [Bishop] for determining and formulating school policies. Its recommendations when approved by the Ordinary become mandatory for all schools • • •" (J.A. 196).

Immediate responsibility for the operation of the system as a whole rests with the Diocesan Superintendent of Schools. He is the "agent of the Ordinary," and it "is his office to transmit and to implement the educational policies of the Bishop and the School Board" (J.A. 197). The canon law of the Diocese provides that "The instructions of the Diocesan Superintendent of Schools must be faithfully and accurately observed at all times" (*ibid.*).[32]

Responsibility for the operation of each parochial school rests with the pastor of the parish church to which the school is appended. The Diocesan canon law provides that "The pastor shall have full charge of the parochial school under the Diocesan Board of Education and the Diocesan Superintendent of Schools" (J.A. 199). Parenthetically, it may be noted that herein lies a critical difference between parochial schools and church related colleges. The latter, while usually sponsored and controlled either by a diocese

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[31] The asterisks in the quotation indicate the omission of the words "with the Bishop presiding," which by stipulation Father Mullen, the Diocesan School Superintendent, would have testified is not in effect (J.A. 121). It is quite understandable that with his manifold duties and responsibilities the Bishop cannot personally preside at School Board meetings, but in all other respects the quotation is conceded to be accurate and effective.

[32] It was stipulated that Father Mullen, if called to the stand, would say "that that would be very nice but he has serious doubts about whether that is true" (J.A. 121). The canon law of the Diocese of Providence is not the only law that is not "faithfully and accurately observed at all times." Even the United States Constitution is occasionally, and in some respects widely, violated but it is still the law of the land.

or a religious order (though generally separately incorporated), are not part of or an auxiliary to any particular parish church.[33]

The pastor is *ex officio* the chief administrative officer of a parish school, although the immediate direction of the school and its instructional program is usually delegated to the sister principal of the religious order whose members constitute the instructional staff in whole or part (J.A. 199).[34] It is, however, the pastor who signs the contracts under which the teachers are engaged and, either himself interviews the applicants for teaching positions or delegates that responsibility to the principal (J.A. 75).

Because the operation, control and financing (J.A. 76) of the individual parochial school are the responsibility of the parish priest under the Diocesan Superintendent of Schools, School Board and Bishop, while the schools themselves are staffed largely by members of religious orders whose membership and operations are not limited to one diocese, some liaison mechanism is required. This is provided by a supervisor assigned by the religious order (also called community) which provides the teaching staff. The Diocesan Handbook of School Regulations states (J.A. 201-202):

> C. To the end that there may be no conflict in authority between the diocesan school system and a religious community, the function of a community supervisor in the schools of the Diocese of Providence is specified as follows:

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[33] Also, unlike parochial schools, establishment and maintenance of colleges are not required by the canon law of the United States.

[34] There appear to be two schools among the 98 in the diocese in which the principal is not a sister (J.A. 74-75). One of these schools, however, is closing this year (J.A. 105).

I. To become well acquainted with the teachers of their communities so as to be able to advise the community superiors on matters of placement and reassignment.

II. To act as liaison between the provincialate and the religious teacher in the school.

III. To cooperate with the superintendent by studying the diocesan school regulations and to encourage the teachers of their community to observe these regulations.

IV. To avoid giving any orders or directions to the teachers of their community that may be in conflict with diocesan regulations or policy regarding curriculum, testing, textbooks, method, or administrative matters.

V. To refer questions concerning school administration beyond the scope of their own authority to the proper diocesan school authorities, namely, the superintendent of schools or the pastor.

3. *Physical Facilities*

The typical parochial school is situated in a building on the same plot as the parish church to which it is appended, although not physically attached to the building (J.A. 76, 104-105). It bears the same name as the church, that of a saint (J.A. 76, 232), which, together with a cross, is on the outside of the building (J.A. 76). A crucifix is to be found in each room as well as a religious statue (J.A. 77, 104). Religious pictures too are to be found throughout the building. In short, "There is no question that when one

visits a school he knows he is visiting a Roman Catholic Parochial School" (J.A. 77).

4. *The Teaching Personnel*

As has been indicated, all but one or two of the principals are nuns or sisters. Of the teachers, about two-thirds are nuns or sisters and the remainder lay teachers. Of the latter, all but from ten to fifteen per cent (i.e., of one-third) are Catholics (J.A. 75-76).

5. *The Student Body*

It may be presumed that the student body in the Rhode Island parochial schools is substantially all Catholic (J.A. 106, 243, 270). The Handbook sets forth the order of preference for admission to the parochial schools, stating (J.A. 223):

> Although wealth should never serve as a criterion for accepting a pupil into a Catholic school, all other things being equal, it would seem fair to give preference to a child whose parents support the parish. Regular use of the budget, rather than the size of the contribution, would appear equitable. *It indicates whether parents regularly attend Mass.* (Emphasis added.)

6. *Religious Practices*

Standard Catholic prayers are recited daily (J.A. 106). The optimum is set forth in the Handbook as follows (J.A. 224):

> 6. Daily Prayers
>
> The following schedule would seem to provide a reasonable sufficiency of daily prayers and to conform to the principle enunciated under Religious Activities (see page 17):

A. Opening of the School Day: *Morning Offering, The Lord's Prayer, Hail Mary,* and the *Apostles' Creed.*

B. After Recess (grades 1-3): The *Memorare*:

C. Noon Dismissal: *The Angelus,* the Doxology: *Glory be to the Father,* etc.

D. Beginning of Afternoon Sessions: *Acts of Faith, Hope, and Charity, the Confiteor.*

E. Dismissal: *The Act of Contrition.*

It is true that, as usually is the case, the optimum is not achieved in practice, and in most cases prayers in the parochial schools in Rhode Island are limited to once or twice daily. But the Handbook was promulgated only five years ago, and this particular provision has never been rescinded or modified, and hence, though not fully adhered to in practice, remains binding.

Besides prayers, religious practices include religious assemblies in observance of Catholic Holy Days, attendance at which is compulsory (J.A. 81-82, 84-85). Here, too, the Handbook sets forth the optimum (presumably in this case adhered to) as follows (J.A. 213):

A. Care should be exercised against unreasonable use of school time for religious activities. A liturgical observance of a Holy Day, Mass on a first Friday, or the Stations of the Cross on the Fridays of Lent would seem reasonable. But to schedule daily or Lenten Mass for student participation during school time is unreasonable and is forbidden.

B. Similarly, there should not be a multiplicity of prayers or lengthy prayers, such as the Rosary, during school time. (For recommended prayers see page 39.)

Other religious practices provided for in the Handbook include attendance of the children at Holy Mass in the event of the death of any member of the clergy of the parish or of any of the teaching sisters in the parish school (J.A. 213). A Mass, as well as a Communion breakfast, is suggested also for graduation (J.A. 226). In addition, retreats and days of recollection form an integral part of the religious program in the Catholic schools. "In the minds of the faculty and students, the retreat should be one of the biggest events of the year" (J.A. 220).

7. *The Parochial School as an Instrument of Recruitment and Training for the Church*

The evidence in this case shows clearly that the Catholic school serves as an important source for the recruitment and training for the Church. Thus, the Handbook makes specific provision for Altar Boys and Choir Boys, as follows (J.A. 227-228):

> 31. Altar Boys
>
> The minimum number of boys required by the liturgy for funeral Masses or other functions during school hours may be excused from class. Careful attention should be directed to the end that:
>
> A. The boys selected are those who can be absent from class with the least harm to their studies.
>
> B. Assignments for serving at funeral Masses are rotated so that the same pupils are not consistently absent from classes.
>
> C. Altar Boy rehearsals may not be held during school hours.

32. Choir Boys

> Choir boys should not be released from school to sing at a funeral Mass. Nor should they engage in rehearsals during school hours except for the period allotted for the teaching of school music.

The Mission Program is another important instrument of recruitment and of propagating and advancing the religious purposes of Catholicism. Its operation is described in part by Father Mullen (J.A. 83) and its objective is set forth as follows in the Handbook (p. 30):

32. Mission Program

> The primary objective of the Mission Program in both the elementary and secondary schools should be the forming of mission minded Catholics. Mission activities will be furthered by teachers, who being mission-minded, integrate mission information with their teaching. This is especially true in the social sciences, as well as religion.

Intervenor-appellants assert that the last sentence (*but only the last sentence*) is not in effect (Brief, p. 72). Nevertheless, it has never been officially rescinded or modified (J.A. 120-121). The Handbook "serves as a guide to the schools in the day-to-day operations of operating the school" and a copy is kept in the principal's office in each school (J.A. 72). In the absence of any official rescission or modification, is it unreasonable to assume that this provision as well as others will be taken as they were intended to be, a binding guide to the operation of the school and the conduct of the teachers?

In any event, deletion of the last sentence means only that special emphasis is not placed on the courses in social sciences and religion, but that all subjects are to receive equal treatment. While the social sciences and religion may present a particularly fertile area in which "mission-minded" teachers can further mission activities through "integr[ating] mission information in their teaching," this can be accomplished also in other subjects, such as in language and literature, and in general communication to the children. (We note here again that nothing in the statute challenged herein forbids mission-minded teachers receiving state salary supplements to integrate mission information with the secular subjects they teach.)

Even more important than the Mission Program as an instrument of recruitment is the Vocations Program (J.A. 83). Its objective and the method of achieving the objective is set forth in the Handbook (J.A. 219) in a provision which defendants concede is still operative and in effect:

> 30. Vocations
>
> Students should be taught to appreciate all vocations: marriage and family life, single life in the world, and religious life. They should be made aware of the immense importance to the Church of vocations to the priesthood and to the religious life. They should understand how great is the need for religious vocations, and the necessity of asking God for the favor of a greater number of vocations. The teacher can help recruit vocations by

A. Inculcating in the pupil a habit of praying for vocations.

B. Giving the pupil a knowledge of the work done by a wide variety of religious communities of men and women.

C. Appreciating his own importance in building correct attitudes toward the priesthood and religious life.

D. Having a professional attitude toward his work and radiating a spirit of happiness and satisfaction.

8. *Religion in Parochial School Teaching*

The evidence in this case shows that the formal teaching of religion as a separate subject is limited to 30 minutes each school day. To assume, however, that this is the sum total of religious education in the Catholic schools is to take a completely unrealistic approach to Catholic education. If that were all there was to it, there would be no reasons for parochial schools; the 30 minutes daily for religious instruction could easily be achieved through a released time program, held constitutional in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), or after school hours.[35]

As recently as 1958, Reverend Joseph H. Fichter, S.J., in an authoritative work on the parochial school system, stated:

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[35] This would entail no additional school time since the parochial school day is one-half hour longer than the minimum school day prescribed by the Rhode Island Compulsory School Attendance Law (J.A. 126). The only inconvenience would be requiring the children to take their religious instruction in a place other than the place where they receive their secular instruction. In view of the millions of dollars this would save the Church, it seems incon-

> It is a commonplace observation that in the parochial school religion permeates the whole curriculum and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: "If it takes forty thousand priests and a hundred forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?" [36]

The same idea is expressed in the Handbook (J.A. 212) as follows:

> Religious formation is not confined to formal courses; nor is it restricted to a single subject area. It is achieved through the example of the faculty, the tone of the school, *the manner in which the curriculum is taught,* and religious activities. (Emphasis added.)

This provision reflects the statement in the 1929 Encyclical of Pope Pius XI *On the Christian Education of Youth* that the "only school approved by the Church is one where . . . the Catholic religion permeates the entire atmosphere [and where] all teaching and the whole organization of the school and its teachers, syllabus and textbooks in every branch [is] regulated by the Christian spirit." [37]

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ceivable that this minor inconvenience should stand in the way if parochial schools were no more than public schools with 30 minutes of daily religious instruction added.

[36] J. Fichter, *Parochial Schools: A Sociological Study,* p. 86 (1958).

[37] J. Redden and F. Ryan, *A Catholic Philosophy of Education,* p. 357 (1956). See, also, Address of Bishop Joseph L. Bernardin,

Intervenor-appellants vigorously contend that neither the italicized phrase from the Handbook nor the Encyclical is binding. Assuming that to be true, the fact remains that neither has been officially rescinded or modified (J.A. 120-121). The Handbook itself quotes from the Encyclical (J.A. 204) without the slightest indication that the Encyclical itself any more than the Handbook may be ignored. Even if neither the Handbook nor the Encyclical is binding, either *de jure* or *de facto*, it is still true that in the absence of any official rescission or modification the principals (all but two members of religious orders) and the teachers (two-thirds members of religious orders) will take both seriously and give them effect in the schools which they operate.

The Handbook, it should be remembered, is not an ancient document. It is hardly more than five years old. It is the canon law of the Providence Diocese. It simply cannot be sloughed off as something every parochial school principal or teacher is free to ignore. At the very least, obligatory or not, the Encyclical and the Handbook are authoritative guides to and evidence of the rationale and purpose of parochial school education.[38] Common law rules of estoppel may not be exactly applicable, but it ill behooves the appellants to assert that the fundamental rationale for

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General Secretary of U.S. Catholic Conference to National Catholic Education Association, April 7, 1969 (p. 4): "Catholic educators have always maintained that a Catholic school is not one which teaches religion only during one period each day. Rather the whole atmosphere of the school is to be a Christian one, animated by a community of faith—the children, the teachers and the parents."

[38] This Encyclical is the most authoritative extant document on the nature, purpose and philosophy of Catholic education. There is hardly a book on the subject which is not based in large measure on it. In *Redden* and *Ryan, supra*, note 37, for example, there are no less than 35 direct quotations or citations of it. See also McCluskey, *supra* note 17, pp. 77-96.

the parochial school system is now obsolete and therefore public support of the system through compulsory taxation is now constitutional.

Nothing in the statute nor in the regulations of the parochial schools, as the District Court noted (J.A. 85; Trial Transcript, 3/19/70, pp. 39-40), forbids permeation of secular subjects with religious content. All that is forbidden is that the teacher receiving a salary supplement be the one teaching the formal religion class. Even the regulations formulated by the Department of Education go no further than requiring the teacher to certify that he uses the books used in the public school system (Tr. 3/19/70, p. 39). Can it be constitutional for a state to subsidize the salaries of teachers in church schools who "integrate" all their instruction with religious content but refrain from conducting the formal 30-minute daily course in religion? If the answer to this question is in the affirmative, the Establishment Clause of the First Amendment may just as well have not been written.

9. *The Integrity of Catholic Education*

It is our contention that the child attending Catholic (or any other) schools cannot be divided and Catholic education cannot be compartmentalized. The Catholic school educates the whole child, not part of the time but all of the time. The Handbook recognizes this. It recognizes the vital "influence of a Catholic school environment" (J.A. 215). It recognizes that "[r]eligious formation is not restricted to a single subject area. It is achieved through the example of the faculty, *the tone of the school* • • •" (J.A. 215. Emphasis added).

It is because the Catholic school educates the whole child as a Catholic, because a "Catholic school environ-

ment" is so essential to Catholic education, because "religious formation . . . is achieved through the tone of the school," that the "secular subjects" teacher cannot be torn out of context and viewed in an aseptic vacuum. It is the integrity of Catholic education which makes it so vital to the Catholic religion and the Catholic Church but it is that integrity which forbids governmental financing of its sacred mission. It is because of this integrity that religion is the heart and lifeblood of the Catholic school and that a statute which authorizes the use of tax-raised funds to meet its operating budget cannot but have the purpose and primary effect of advancing religion.

We conclude this part of our brief with a short postscript. Applying the purpose-effect test completely, the District Court found that the Rhode Island statute did not merely advance religion, but inhibited it as well (J.A. 43-45). This might appear paradoxical if not self-contradictory, but it has long been recognized that governmental involvement in religious affairs even when motivated by a desire to aid and support religion inevitably brings harm to it.[39] It is for this reason that this Court has so often stated that governmental abstention from involvement in

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[39] See Madison's Memorial and Remonstrance against the Virginia Assessment bill (330 U.S. at 67):

> 7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstitution, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

religious affairs is not a manifestation of hostility to religion but of benevolent neutrality.[40]

III.

Walz: entanglement.

There is little that we can add to the District Court's unanimous opinion in respect to the invalidity of the challenged statute under the *Walz* test. We find it difficult to see how a contrary result could be reached under that test. With the exception of the divided Michigan court in *Matter of the Legislature's Request,* every court, state or Federal, which since the *Walz* decision considered a statute similar to the one in issue here has declared it unconstitutional under *Walz.*[41] The United States Court of Appeals for the Sixth Circuit has held that even a textbook law may be unconstitutional under the *Walz* test if it goes beyond the narrow provisions of the New York statute upheld in *Allen* and if it requires more governmental involvement in applying statutory safeguards than was present in the New York statute, *supra,* p. 21, footnote 27.

It is therefore hardly surprising that the appellants and the intervenor-appellants herein base their case on *Schempp-*

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[40] *McCollum* v. *Board of Education,* 333 U.S. 203, 211-212 (1948); *Engel* v. *Vitale,* 370 U.S. 421, 433-435 (1962); *Schempp,* 374 U.S. 226; *Walz,* 90 S. Ct. at 1414.

[41] *DiCenso* v. *Robinson; Johnson* v. *Sanders; State ex rel. Chambers* v. *School District No. 10; Seegers* v. *Parker.* While the opinion in the last cited case stated that it was based on the state constitution, it did consider the *Everson, Schempp-Allen,* and *Walz* tests, and reached the conclusion that the challenged statute was unconstitutional under all three.

Allen almost as if *Walz* had never been decided.[42] But *Walz* will not go away, nor can it easily be explained away. The appellant-State of Rhode Island seeks to achieve this by arguing that the statute does not require "a week-to-week or month-to-month surveillance," but only an "annual" one, since "teachers are hired on an annual basis." (Brief, p. 26.) This assertion is obviously predicated on the assumption that nothing more is required of the State than to exact from the teachers an annual promise that they will not teach religious subjects and that there is no obligation on its part to insure compliance with the promise.

Walz certainly does not contemplate such an easy disposition of the surveillance problem. Tax returns are also required only on an annual basis, and the taxpayer affirms that what he says is true. Yet the Court held that

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[42] Appellants' Brief (p. 11), after noting *Walz*, blandly states: "The test or standard that has emerged is three-fold, viz: (1) Is the purpose of the Statute secular? (2) Is the primary effect of the Statute the advancement of religion? (3) Is the primary effect of the Statute the inhibition of religion?"

The Brief of intervenor-appellants devotes 33 pages to *Schempp-Allen* and only six to *Walz*. It almost suggests that *Walz* is really *Schempp-Allen* in disguise. It asserts that the District Court was "inaccurate" in observing that "neither the majority nor concurring opinions [in *Walz*] rely on the *Schempp* formulation," since the majority did examine both the purpose and effect of exempting church property from taxation. Brief, p. 61, fn. 61. But the effect considered in *Walz* is the effect on *entanglement*, which is something quite different from effect on *advancement of religion* upon which appellants rely so heavily. The footnote continues that while it "is true that the Court in *Walz* did not quote the *Schempp* formulation of the purpose and primary effect test . . . that formulation appears verbatim in *Board of Education* v. *Allen*, a decision which the majority in *Walz* cited with obvious approval." By that reasoning the *Everson* test is alive and well, for, without exception, every decision of this Court since *Everson* involving aid to religion has cited *Everson*. See discussion of the *Everson* test in the briefs in *Tilton* and *Lemon* referred to *supra*, p. 7. (*Everson* is the only decision cited in *Engel* v. *Vitale*, 370 U.S. 421, 428 (1962).)

requiring churches to pay taxes would result in substantial entanglement and surveillance. Moreover, aside from the statutory promise, the First Amendment, as all parties hereto concede, requires that at the very least those teachers whose salaries are paid in part by the state must refrain from introducing religion into the subjects which they do teach. The demands of the Rhode Island constitution may be satisfied by an annual written promise; but the fundamental freedoms of the United States Constitution demand considerably more.

What, in effect, appellants are saying is that the Establishment Clause's barrier against continuing surveillance can be disposed of by the simple device of dispensing with surveillance. Measured by that standard, we cannot offhand think of any governmental aid to religion or religious schools—and certainly not outright, unqualified subsidies—which would violate that Clause.

Appellants and intervenor-appellants both stress that the state is already heavily involved in the operations of parochial schools so what harm can a little more involvement do? They point to laws pertaining to compulsory attendance and curriculum and to health, safety, buses and lunches. (Appellants' Brief, p. 26; Intervenor-appellants' Brief, pp. 58-59.) Intervenor-appellants go so far as to assert that present Rhode Island law "gives local school committees a life-or-death power over all nonpublic schools." (Brief, p. 58.)

In response to the last statement, we presume to borrow (as the Court did in *Walz*) from Mr. Justice Holmes in adding, "Not while this Court sits." *Pierce* v. *Society of Sisters, supra,* holds that a state may not directly pass a

death sentence upon nonpublic schools. *Farrington* v. *Tokushige,* 273 U.S. 284 (1927) holds that it cannot achieve the same result by excessive regulation of their operations.

There is a vast difference between the surveillance contemplated by the statute herein and that required to assure that the ceilings in nonpublic schools will not fall down upon the children or that the buildings have sufficient exits for use in case of fire. If the latter surveillance justifies governmental subsidies to religious schools, so too would it justify subsidies to churches and synagogues.

Even statutory requirements regarding pupil attendance and curriculum stand on a different footing. The state has a constitutional right to compel parents to provide their children with a minimum secular education.[43] Under *Pierce* v. *Society of Sisters,* parents have the constitutional right to provide the education through institutions other than the public schools. But the right of the state, in protecting the children's welfare to assure that the children receive a minimum secular education, is superior to the parents' right to send the children to sectarian schools or the right of the church to operate schools. Hence, the state is empowered to condition the rights of both the parents and the schools to the extent necessary to assure the protection of the children's welfare. Cf. *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). Thus, for example, the state may require that the children in the nonpublic schools take state administered tests or that the teachers be holders of state licenses. But this is a far cry from holding that the state may pay the salaries of those

[43] *People* v. *Donner,* 199 Misc. (N.Y.) 643, 278 App. Div. 705, 302 N.Y. 857, appeal dismissed, 342 U.S. 884 (1951); *State* v. *Garber,* 197 Kan. 567, appeal dismissed, cert. denied, 389 U.S. 51 (1967).

teachers any more than it may pay for the physical maintenance or construction of the school so as to assure the health and safety of the children.

Above all, the surveillance contemplated and required both by the Rhode Island statute and the Establishment Clause is of a critically different species from that necessary under the laws referred to by appellants and listed in the appendix to the intervenor-appellants' brief. None of these laws require or empower the state's agents to pass judgment on what teaching is secular and what religious. It is just this kind of censorship that the Court adjudged violative of the First Amendment in *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940).[44] It is to avoid such censorship of religion by a governmental official which, as the Court in *Cantwell* v. *Connecticut* noted may actually empower him to pass a life or death sentence, that underlies the Court's decisions against governmental intervention in religious matters. See, *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1872); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *Presbyterian Church in the United States, et al.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al.,* 393 U.S. 440 (1969). See also *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953).

Intervenor-appellants assert (Brief, p. 38) that *Walz* forbids only excessive governmental involvement with religion and that this would be present only "if the administrative controls placed on religiously affiliated schools

[44] Of course, *McCollum, Engel* and *Schempp* require such surveillance in the public schools, but the Establishment Clause does not forbid the state from entanglement with and surveillance over its own institutions. Cf. *Farrington* v. *Tokushige, supra,* wherein the Court pointed out that the overly-regulated schools "receive no aid from public funds." 273 U.S. at 291.

were broader than necessary to assure a purely secular use of public funds." Nothing in *Walz* supports such an interpretation of the entanglement test. On the contrary, the Court there, in declining the invitation to base its decision on the fact that churches perform secular (social) services as well as religious ones, said (90 S. Ct. at 1414):

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. *To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.* (Emphasis added.)

The Salary Supplements Act thrusts the State of Rhode Island directly into the business of operating parochial schools. It makes the State co-employer with the parish of teachers in the parochial schools, and in that capacity

as well as by reason of the principle established in *McCollum* that publicly supported teachers may not teach religion, it must undertake continuing supervision of the teachers and surveillance over them in their discharge of their duties. If this does not constitute excessive entanglement and involvement in religious affairs, we cannot imagine what would.

IV.

Religious means and secular ends.

In his concurring opinion in *Schempp,* Mr. Justice Brennan said (374 U.S. at 265):

> • • • [T]he teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.

It was on this principle that he based his concurrence in *Walz,* and it is a principle that we believe is fully consistent with the history and purpose of the Establishment Clause.

We have already quoted (*supra,* p. 14) from the preamble to the Virginia Bill Establishing a Provision for Teachers of the Christian Religion, setting forth exclusively secular ends for a religious tax law. Madison's response to this in his *Memorial and Remonstrance* was that governmental use of "Religion as an engine of Civil Policy

. . . [is] an unhallowed perversion of the means of salvation." [45]

History from ancient times to the present validates Madison's judgment. The Bible (1 Kings 12:26) relates that after Jeroboam led the northern tribes in revolt against the Davidic dynasty, he

> • • • said in his heart, Now shall the kingdom return to the house of David: if this people go up to do sacrifice in the house of the Lord at Jerusalem, then shall the heart of this people turn again unto their lord, even unto Rehoboam king of Judah, and they shall kill me, and go again to Rehoboam king of Judah. Whereupon the king took counsel and made two calves of gold, and said unto them, It is too much for you to go up to Jerusalem: behold thy gods, O Israel, which brought you up out of the land of Egypt. And he set the one in Bethel, and the other put he in Dan. And this thing became a sin: for the people went to worship before the one, even unto Dan. • • •

Many other similar instances in the history of religion, from Constantine's establishment of Christianity as the official state religion in order to unify the Roman empire to contemporary utilization of religion to maintain an oppressive state as in the Soviet Union[46] testify to the validity of the judgment of Jefferson, Madison and other founders of our republic that religion is corrupted when it allows

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[45] *Everson* Appendix, 330 U.S. at 67.

[46] Cf. *Kedroff* v. *St. Nicholas Cathedral, supra.* See M. Spinke, *The Church in Soviet Russia,* passim (1956); J. Gsovski, ed., *Church and State Behind the Iron Curtain* (1955).

itself to be used for governmental purposes. Even where religion is not corrupted, it is substantially weakened in carrying out its sacred mission when it relies on governmental support and financing.[47] It is for these reasons that the great statesman and jurist, Jeremiah S. Black, stated that the fathers of our Constitution "built up a wall of complete and perfect partition" between church and state in order that "one should never be used as an engine for the purposes of the other."[48] Governmental abstention from financing as from taxing is not an expression of hostility, but truly of benevolent neutrality.

To hold that government may as a matter of convenience rather than overriding necessity employ religion or religious institutions as a means to effect secular ends which are properly within governmental competence would go far toward making the First Amendment meaningless. Practically every defense of religious instruction in public schools is predicated on the not unreasonable assertion that religious education leads to morality and good citizenship. If religion could be used to achieve the obviously secular goals of morality and good citizenship, it would follow not only that religion could constitutionally be taught in the public schools, but also that tax-raised funds could be used to finance religion and religious education.

Moreover, the government could reasonably find that some religions, such as Protestantism, Catholicism, and Judaism, are more likely to inculcate good citizenship than

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[47] The District Court noted that "some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy." J.A. 44.

[48] J. S. Black, *Essays and Speeches*, p. 53 (1885).

others (Jehovah's Witnesses or the Black Muslims, for example) and, therefore, could aid the former and not the latter. This is a conclusion we doubt this Court would accept today, any more than it accepted in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) the use of a religious test to assure more honest notaries or other civil servants.

Nothing in the record of this case presents any demonstration, much less "the clearest demonstration," that the secular purpose of Rhode Island in providing for all its children a satisfactory secular education could not be served by expanding the facilities and personnel of its public schools to accommodate those children seeking admission. The nonpublic school authorities assert that their school systems are in dire financial straits and in the absence of governmental funds may be required to curtail their activities if not discontinue them. There is no way to challenge this assertion since, unlike public officials, religious groups are not required to nor do they generally disclose the extent of their financial resources or how they allocate them among the various religious missions they carry on.

But even if the claim of financial straits is fully accepted,[49] and even if it be assumed that in the absence of

[49] It is hardly startling news that the public schools too are in dire financial straits. The New York *Times* of January 11, 1971 (p. 46), for example, reports that the New York City public schools are unable to provide breakfast for the needy children attending them because, while the Federal and state governments each are making available twenty cents per child for this purpose, the New York City Board of Education does not have the resources to furnish the twenty cents per child matching funds that are required. Moreover, not all parochial school systems face financial crises. The Jewish parochial schools, for example, have in the past 25 years increased from 30 in three cities to 425 in 31 states and

governmental support the parochial schools will be required to curtail or even discontinue operations, it does not clearly follow that the added expense to the state in educating the additional children in the public schools will be more than supporting the nonpublic schools they now attend. The District Court noted that "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." (J.A. 41.)[50]

As we have indicated (*supra*, pp. 17-20), the history of the demands of nonpublic schools for tax-raised funds points clearly towards complete public financing of nonpublic

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plans are under way to expand the system during the next decade by adding 125 elementary and 75 high schools. New York *Times*, November 14, 1970, p. 33. See also, J. M. Swomley, "Are Parochial Schools Imperiled," *Christian Century*, January 13, 1971, p. 40.

[50] Counsel for the intervenor-appellants recognized and acknowledged this, as appears from the following colloquy (Tr. 3/19/70, p. 35):

> Judge Pettine: Yes, I think that's what Judge Coffin is saying. If you give 15%, why can't you give 100% on the theory you propounded must follow. Perhaps if you go that far, why can't you subsidize the building?
>
> Mr. Collins: I do go that far, then.

While we contend that this is patently unconstitutional, certainly under the *Everson* principle and no less so under the purpose-effect test, counsel for the intervenor-appellants take the position that it is constitutional under the latter test, as is evidenced by the following colloquy (Tr. 3/19/70, pp. 37-38):

> Judge Coffin: If I may, I'd like to follow up and ask you a conclusive question. Supposing we have this sort of a building and it's subsidized, that is, 100% support of the teacher salaries, all of the teachers teaching secular subjects with state subsidy for the maintenance of the building and what not, and in that situation, I take it, you would also say that the primary effect was not to advance any particular religion?
>
> Mr. Collins: Yes, Your Honor. • • •

schools.[51] The supplanting of the innumerable rural "little red school houses" by modern well-equipped and well-staffed consolidated school districts, and the tragic history of the dual school system in the South, show that a unitary school system is likely to provide better education at a lower cost than a host of independent, parallel and competing systems.

Even if this is not so; even if it would cost more to educate parochial school children in the public schools than to finance their education in parochial schools, it does not follow that the test suggested by Mr. Justice Brennan has been satisfied. Democracy is not necessarily the cheapest form of government; and our Bill of Rights secures liberties which can be quite costly when measured in terms of dollars. It would be, for example, far more economical to forbid an unpopular speaker to speak than to provide him with the costly police protection which enables him to speak. (Cf. *Kunz* v. *New York,* 340 U.S. 290 (1951).)

All the fundamental freedoms of the First Amendment, including the freedom from established churches, are precious. It was the judgment of those who wrote the amendment and the generation of Americans which put it into our Constitution, that they were well worth the cost. We believe that judgment is no less valid today.

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[51] The initial expenditure of funds for nonpublic schools under the statute in *Lemon* was $6.4 million for the 1969-70 school year. The estimated cost for the 1971-72 school year is $36.1 million, according to the Pennsylvania State Department of Education. *Religious News Service,* January 20, 1971.

V.

The test of time and space.

In *Walz* both the Court's opinion by the Chief Justice (90 S. Ct. at 1415) and the concurring opinion of Mr. Justice Brennan (at 1418) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in exactly the opposite direction. From the disestablishment of churches at the end of the 18th and the beginning of the 19th centuries until the past few years neither the Federal government nor any state has directly subsidized the operations of sectarian educational instructions.[52] Just as the constitution or laws of every state in the Union authorize tax exemption so do they universally forbid direct subsidization. See Note, *Catholic Schools and Public Money,* 50 Yale L.J. 917 (1941): *Horace Mann League* v. *Board of Public Works, supra;* C. Zollman, *American Church Law,* 78-80 (1933).

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[52] *Quick Bear* v. *Leupp,* 210 U.S. 50 (1908) is no exception. The funds there used to finance the operations of Indian mission schools belonged to the Indians, and not to the Federal Government which held legal title merely as trustee for the Indian tribes at whose direction the funds were allocated. It can hardly be contended that the First Amendment allows governmental funds to be unqualifiedly appropriated to mission schools.

Other than *Lemon* and the divided opinion of the Michigan Supreme Court referred to above (p. 12), we know of no case in a court in the United States, Federal or state, in which a law providing for payment of tax-raised funds to a church to subsidize its sectarian school operations has been upheld as constitutional. There have been, as we have indicated (*supra,* p. 18) a number of cases wherein parochial schools experiencing financial difficulties were purportedly transferred to the public school system under a plan whereby the parochial school premises were rented to the public school authorities and the teachers, usually nuns and sisters, were employed *en masse* by them as public school teachers. With but one exception,[53] the arrangement was held unconstitutional in every case and even in the exceptional case constitutionality was based on a factual finding that the school was no longer a parochial school but had in fact become incorporated into the public school system even though the nuns turned over their public money salary checks to the religious order to which they belonged.

The challenged statute, we submit, cannot withstand the test of time and space.

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[53] *State ex rel. Johnson* v. *Boyd, supra.*

VI.

Establishment, racial segregation and the balancing test.

Paragraph 5 of the complaint in *Lemon* alleges the following:

> 5. Non-public schools, including the defendant schools are, de facto, racially segregated, either by religious requirement, design, tradition, policy, quota, cost, or residential pattern, and the aid rendered to such schools will perpetuate and promote such racial segregation in that said subsidy will further enable private schools to increase their enrollment, which increase in enrollment will be exclusively or almost exclusively white which, in turn, will increase the percentage of Negro enrollment in the public schools, thus aggravating said de facto segregation and, in turn, strengthening the preference of many white parents to enroll their children in nonpublic schools (by reason of the racial prejudice of said parents or because the public schools will necessarily become inferior by reason of obtaining a smaller percentage of the total funds which the community is prepared to commit for education), which will, in turn, generate political pressures for even greater tax aid to private schools, justified by their increased enrollment, with the ultimate result of promoting two school systems in the Eastern District of Pennsylvania—a public school system predominantly black, poor and inferior, and a non-public school system predominantly white, affluent and superior.

The District Court held that this paragraph sought to assert a claim under the Equal Protection Clause of the Fourteenth Amendment and since none of the plaintiffs was the parent of a Negro child who had been denied admittance to any nonpublic school, they did not have standing to assert the claim.

The complaint in *Johnson* v. *Sanders* contained a similar allegation, asserting that if the statute there challenged were allowed to stand it would have "the ultimate result of promoting two school systems in Connecticut, especially in the larger cities—a public school system predominantly black, poor, and inadequate, and a non-public school system predominantly white, affluent, and superior." Plaintiffs submitted substantial statistical evidence to support this allegation, but the District Court there too held that the plaintiffs had no standing to raise the Equal Protection issue. Nevertheless, it went out of its way to state that "this disposition of the question, which avoids the merits, should not be construed to imply that, assuming a qualified plaintiff, this court regards the issue itself as frivolous or without substance." —— F. Supp. —— at ——; Slip Opinion, pp. 24-25.

Whether the District Courts were correct in their disposition of the issue, in view of the expanded concept of standing expressed in *Flast* v. *Cohen,* 392 U.S. 83 (1968) and *Association of Data Processing Service Organizations* v. *Camp,* 90 S. Ct. 827 (1970), is not before the Court in this appeal, though it is in the appeal in *Lemon.* We did not raise the Equal Protection claim in the present case but relied exclusively on the First Amendment. Notwithstanding that fact, and irrespective of how the standing question

is decided in *Lemon*, we believe that the relationship of racial segregation to governmental support of nonpublic schools is relevant to the determination of the Establishment issue as raised in this appeal for the following reason.

It is our position that the Establishment Clause must be interpreted, as it was in *Everson*, as setting up an absolute prohibition upon governmental subsidization of the operations of parochial schools. There are, however, dicta in *Allen*—dicta because the Court there stressed that no subsidization was involved—which might be construed as indicating that a balancing test is appropriate. In *Allen*, the Court said (392 U.S. at 247-248):

> Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

But if balancing is the test, the balancing must be judged ultimately by the courts, not the legislature, at least where the First Amendment is concerned. In *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), the Court in invalidating a state statute limiting the number of cars on trains held that the state's interest in insuring the safety of its citizens must be weighed against the national interest in free-flowing interstate commerce. If there is a hierarchy of constitutional values in our system of democracy, certainly the fundamental freedoms of the First Amendment occupy a status not lower than that of interstate commerce, and laws impairing the integrity of the Establishment Clause should be subject to judicial scrutiny no less searching than that imposed on laws threatening the integrity of the commerce clause.

If a law which a state legislature reasonably found to be necessary for the protection of human life can be invalidated because the Court deems the state's interest therein to be outweighed by the constitutional interest in uninhibited interstate commerce, so too can a law deemed by the legislature to be necessary to insure adequate secular education for children attending nonpublic schools be invalidated because it is outweighed by the constitutional interest in a racially integrated society. Indeed, the latter case is stronger, for the State of Arizona had no alternative means of protecting human life whereas, as the District Court in *Johnson* v. *Sanders* stated in denying a motion to stay its judgment, "children who cannot be accepted in denominational private schools will not be bereft of education as the public school facilities remain open to them."

If balancing is the test, balancing requires that both sides of the scale be weighed. In *Allen*, the Court paid fitting

tribute to the role played by nonpublic schools, including parochial schools, "in raising national levels of knowledge, competence and experience" and in providing for their pupils an acceptable secular education. But this is not the whole picture; there is a darker side which too must be considered and given due weight. There was no record in *Allen;* the Court's assessment of the role played by nonpublic schools in educating children was obviously based on judicial notice. Judicial notice, however, can show as well that nonpublic schools, including parochial schools, are playing a substantial though unintended role in the preservation of racial segregation.

It is a matter of common knowledge that judicial pressure toward racial integration in the public schools of the South has led to a mushrooming of newly-established private schools and "academies," [54] some of which are church related.[55] Private schools, especially parochial schools, are comparatively rare in most parts of the South, and hence the necessity for establishing new ones. In the North, and in some parts of the South as well (e.g., Louisiana), there already exists a well-established network of nonpublic schools, and the need to create new ones to avoid racial integration is not so urgent.

The nonpublic school community is a community of white, middle and upper class children. This is a fact substantiated by every study that has been made. According to the

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[54] See *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 223 (1964).

[55] The New York *Times* of September 5, 1970 reports on page 9 the establishment of the Woodland Hills Academy in Mississippi, connected with the Woodland Hills Baptist Church, a denomination which has not previously been known to operate parochial schools.

Census statistics for 1960-62, 14.2% of the children attending public schools were non-white; in nonpublic schools, the percentage was 3.5.[56] In the urban areas particularly, the private school is often a white oasis surrounded by a nonwhite desert. Very few children belonging to ethnic minority groups and very few children of poor families attend private schools; their universe of education is the public school system. This is shown by the authoritative study made by the United States Commission on Civil Rights, reported in Racial Isolation in the Public Schools, Vol. 1 (1967) at pp. 38-39 (footnotes omitted):

Nonpublic Schools

> Private and parochial school enrollment also is an important factor in the increasing concentration of Negroes in city school systems. Nonpublic school enrollment constitutes a major segment of the Nation's elementary and secondary school population. Nationally, about one-sixth of the total 1960 school enrollment (Grades 1 to 12) was in private schools. In metropolitan areas the proportion is slightly higher, and divided unevenly between city and suburb. Nearly one-third more elementary school students in the cities attend nonpublic schools than in the suburbs. Almost all of them are white. In the larger metropolitan areas the trend is even more pronounced. As Table 8 shows, a much higher proportion of white city students than white suburban students attend private and parochial

[56] Statistical Abstract of the United States (1963) Table No. 148; U.S. Bureau of the Census, 1960 Census of Population, PC(2)-5A, Table A-1 at 129 (1964).

elementary schools. Nonwhites in these metropolitan areas, whether in cities or suburbs, attend public schools almost exclusively.

TABLE 8.—*Proportion of total elementary students, by race, in public and nonpublic schools, for 15 large metropolitan areas, 1960*

	Central cities		Suburbs	
	White	Nonwhite	White	Nonwhite
Public	61	94	75	97
Nonpublic	39	6	24	3

Source: Taueber, *Tables on School Enrollment in Selected Metropolitan Areas*, prepared for the Commission.

Thus, nonpublic schools absorb a disproportionately large segment of white school-age population in central cities, particularly in the larger ones. This poses serious problems for city school systems. In St. Louis, for example, 40 percent of the total white elementary school population attended nonpublic schools in 1965; in Boston, 41 percent; in Philadelphia, more than 60 percent.

In Detroit, according to a New York *Times* report (December 19, 1970, p. 16), two-thirds of the children in the public schools are black. In Philadelphia, more white children attend parochial schools than public schools. M. Friedman and P. Binzen, "Politics and Parochiaid," *New Republic,* January 23, 1971, p. 13. In Connecticut a compilation by the Catholic Archdiocese of Hartford for the year 1968-69 showed that 2.6% of the state's parochial school population was black, and 1.2% Spanish speaking

(Puerto Rican).[57] The comparative figures for the public schools were respectively 8.3% and 2.8%. The disparity in respect to black pupils is of course explainable by the fact that only a small percentage of black Americans are Catholic, but this does not alter the fact that the parochial schools are an institution of white Americans. That nonpublic schools are also an institution of upper and middle class Americans appears from a comparison of the percentages of poor children, i.e., those receiving benefits under the Federal Aid to Families with Dependent Children program (AFDC) in public and nonpublic schools in Connecticut as of 1970. This shows that while 6.3% of the children attending the public schools in the State are AFDC children, only 1.4% of the children in nonpublic schools are of that category.

This disparity between the percentages of white and nonwhite children in public and nonpublic schools is not merely continuing but is growing steadily greater. A report by the Connecticut State Department of Education issued in April, 1970, showed that in September, 1967, 7.8% of the enrollment in the public schools of that state was black; one year later, it had risen to 8.3%; one year after that, in October, 1969, it had again risen and was now 8.6%.

The explanation for this trend is that an increasing number of parents are withdrawing their children from public schools and sending them to private schools, including parochial schools, not so that they may better pursue God but more effectively avoid racial integration. This development sorely troubles most religious leaders, in-

[57] The statistics for Connecticut are part of the Record in *Johnson* v. *Sanders*.

cluding those in Rhode Island, and they are sincerely and diligently but nevertheless vainly seeking means to counteract it. It troubles public educators as well. The New York *Times* of December 7, 1969 reported that Dr. Nathan Brown, Acting Superintendent of Schools in New York City, in an address delivered at a Jewish theological seminary, called the attention of Jewish leaders to this problem. "I deplore," he said, "any action on the part of Jewish parents who escape the city school system for the sole purpose of avoiding racially integrated schools." He referred to what he called the increasing Jewish enrollment in religious and "pseudo-religious" schools in the light of social, ethnic and class conflicts arising from school reorganization, and expressed the fear that alienation of the Jewish middle class from the system could result in a city of "ghettos surrounded by police protecting one group from another."

In Connecticut, in October of 1969, the United States Department of Justice brought suit against the Department of Education of Waterbury, charging in its complaint among other things that "white children who reside in public school districts where substantial numbers of Negro and Puerto Rican children also reside have been transported by the City of Waterbury from such public school districts to all white or predominantly white independent non-public schools, wherein to a substantial extent, facilities of public schools which commonly are located adjacent to or near the respective independent non-public schools are shared. This practice has resulted in certain public elementary schools becoming and remaining predominantly Negro and Puerto Rican." [58]

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[58] Complaint in *United States* v. *Board of Education of Waterbury*, U.S.D.C. for Connecticut, Civil Action No. 13465.

Following this Court's decision in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), ordering immediate integration in the public schools in the South, white Catholic schools in Louisiana were besieged by new white applicants seeking to escape the public schools. The Archdiocese of New Orleans and the Diocese of Baton Rouge promulgated special guidelines to prevent parochial schools from becoming havens for fleeing whites. These guidelines have been only partially successful.[59] Following the pattern in the public schools, the Catholic system maintains separate schools for white and black children. In Lafayette Diocese the Academy of the Immaculate Conception, a white school, enjoyed a 22% increase in enrollment in 1969-1970. In June, 1970, parents of children in the black school brought a suit in the United States District Court for the Western District of Louisiana[60] seeking judgment requiring termination of the dual system on the theory that the receipt of such financial aid from the state as tax exemption, free textbooks, etc., constituted a nexus between the state and the Catholic school system sufficient to render the Fourteenth Amendment applicable.

The leadership role of the National Association for the Advancement of Colored People (NAACP) in the Negro's struggle for equality is a matter of common knowledge; it has been recognized in at least two decisions of this

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[59] Guillory, "Louisiana Desegregation—And Catholic Schools," *America*, Sept. 5, 1970, p. 119; Cozzi, "Catholic Segregation: It's Almost 1954," *Commonweal*, December 25, 1970, p. 317.

[60] *Auzenne* v. *School Board of the Roman Catholic Diocese of Lafayette*, Louisiana, Civ. Action No. 15,804.

Court: *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963). It is also a matter of common knowledge that the NAACP has traditionally kept itself aloof from controversies which did not directly affect the cause of racial equality. It is therefore of great significance that state branches of the NAACP are now not merely participating in the sponsorship of suits challenging governmental financing of parochial schools but are actually joining such suits as parties plaintiff. The Pennsylvania NAACP is a party plaintiff in *Lemon;* the Connecticut NAACP is a plaintiff in *Johnson* v. *Sanders;* the Michigan NAACP is a party plaintiff in *Citizens to Advance Public Education* v. *Porter,* Circuit Court for County of Ingham, Michigan, challenging assignment of public school teachers to serve in parochial schools; the New Jersey NAACP is a party plaintiff in *American Civil Liberties Union* v. *Marburger,* United States District Court for the District of New Jersey, Civ. No. 1727-70, challenging a purchase of secular services law.

Nor is NAACP activity limited to the litigation front; it is no less active in opposing legislation seeking to provide public financial aid to nonpublic schools. In Michigan, for example, the state NAACP played a leadership role in seeking to defeat enactment of a bill providing for purchase of secular services and in seeking adoption of a constitutional amendment forbidding all financial aid to parochial schools. (See full page advertisement in the Michigan *Chronicle,* January 17, 1970, p. 15.) In Delaware, the state NAACP publicly opposed enactment of an aid to parochial school measure on the ground that many white parents send their children to private schools to avoid in-

tegrated education. *Wilmington Journal,* December 18, 1970. In Maryland, the Black community took the same position for the same reasons. See Testimony of Mrs. Enolia McMillan, president of the Baltimore Branch of N.A.A.C.P., at Hearings of Committee on Ways and Means, Maryland General Assembly, March 3, 1970; Editorial, "State Education Aid," *Baltimore Afro-American,* February 21, 1970.

It was not the purpose of those who founded America's parochial school system that it should become a place of refuge for whites fleeing Negroes. Nor is this the purpose of the religious leaders who strive in a time of mounting educational costs to maintain that system. And that is also not the purpose of the legislatures which appropriate public funds for the support of parochial schools so that those schools may continue to exist. It is, however, the purpose of many parents, North and South, who send their children to nonpublic schools. And it is an effect, and increasingly a primary effect of laws which appropriate tax-raised funds for the support of nonpublic schools.

The effect may well be even more serious. It is not too much to suggest that the preservation of the equalitarian, multiracial and multireligious public school system envisioned by its founders rests upon the outcome of the intense struggle for governmental financing of nonpublic schools. To the extent that the public schools, particularly in urban areas, remain multiracial, the explanation lies in the fact that almost all the white children attending them are members of middle income families who simply cannot afford to pay the tuition and other expenses in nonpublic schools. These middle income white children are the flesh and blood of a multiracial public school system. Should

the time come when through increasing governmental support of nonpublic schools it will be economically feasible for white middle income parents to send their children to nonpublic schools, the public school system will become the modern day equivalent of the pre-public education charity school—an institution for society's rejects most of whom will be members of racial minorities. We will then end up with the two school systems—separate and unequal.

CONCLUSION

For the reasons set forth herein, the unanimous decision of the court below should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 569 and 570

JOHN R. EARLEY, ET AL., APPELLANTS

v.

JOAN DICENSO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the district court (App. 28–30) are reported at 316 F. Supp. 112.

JURISDICTION

The judgment of the district court was entered on June 17, 1970 (App. 50–51). The notices of appeal were filed on June 26, 1970 in No. 569 and on June 25, 1970 in No. 570 (App. 52–54). Probable jurisdiction was noted on November 9, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *.

The Rhode Island Salary Supplement Act, R.I. Gen. Laws, chap. 16–51, is reproduced in full at App. 182–186.

QUESTION PRESENTED

Whether the Rhode Island Salary Supplement Act, which provides supplements of fifteen percent of the annual salary of teachers of secular subjects in non-public schools, violates the Establishment Clause of the First Amendment, which applies to the States through the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The United States has filed a brief *amicus curiae* in *Lemon* v. *Kurtzman,* No. 89, this Term, involving the closely-related question of the validity under the Establishment Clause of the First Amendment of a Pennsylvania statute under which the State reimburses religiously-affiliated private schools for teachers' salaries incurred and textbooks and instructional materials used in teaching secular subjects. We set out at pages 2 to 4 of that brief the interest of the United States in that case. That discussion applies equally to the present case, where the government has the same interest.[1]

[1] In footnote 1 on page 4 of the *Lemon* brief, we noted that the constitutionality of Title II of the Elementary and Second-

STATEMENT

This is a suit to declare the Rhode Island Salary Supplement Act, R.I. Gen. Laws, chap. 16–51, unconstitutional and to enjoin its enforcement on the ground that the Act violates the Establishment and Free Exercise Clauses of the First Amendment (App. 4, 8). The plaintiffs are individual citizens and taxpayers of Rhode Island (App. 4). The defendants are the State Commissioner of Education, Treasurer, and Controller (App. 5), all of whom have official responsibilities under the Act. The intervenor-defendants are teachers eligible for salary supplements under the Act and parents of children in church-related schools (App. 28).

1. THE STATUTE

The Salary Supplement Act is based on legislative findings that about twenty-five percent of all elementary school pupils in Rhode Island attend nonpublic schools, that the quality of education in nonpublic schools has been placed in jeopardy by rising costs, and that the continued ability of nonpublic schools to pay salaries adequate to attract competent, dedicated teachers is a particularly serious problem. R.I. Gen. Laws § 16–51–1, App. 183. The stated purpose of the statute is to insure the maintenance of "a quality education for all Rhode Island youth," by "assist[ing]

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ary Education Act was then pending before the United States Court of Appeals for the Sixth Circuit in *Protestants and Other Americans United for the Separation of Church and State* v. *United States* (No. 20,270). On December 16, 1970, that court remanded the case to a three-judge district court for determination.

nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." *Ibid.*

The Act provides that the State will supplement the salaries of teachers of secular subjects in nonpublic elementary schools by not more than fifteen percent of an eligible teacher's current salary; as supplemented, the salary cannot exceed the maximum salary paid to teachers in Rhode Island public schools. § 16–51–4. For teachers to be eligible to receive the supplement, the school must not be operated for profit and must meet the educational standards prescribed in the State's compulsory school-attendance law (§ 16–51–2(1)); the annual per student expenditure for secular education must not equal or exceed "the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations as determined by the commissioner of education." § 16–51–2(1).

A teacher receiving a supplement may teach only those subjects that are offered in public schools in the State. § 16–51–3(1). He must be certified by the state board of education "in substantially the same manner that such certificates are issued to teachers in public schools." § 16–51–3(3). He may use "only teaching materials which are used in the public schools of the state." § 16–51–3(4). Finally, any teacher applying for salary supplement must agree in writing "not to teach a course in religion for so long as or during

such time as he or she receives any salary supplements provided for under the provisions of this chapter." § 16–51–3(5).

2. THE EVIDENCE

At a hearing before a three-judge district court, extensive evidence was introduced concerning the nature of secular instruction in Roman Catholic elementary schools in Rhode Island and the impact of the challenged statute on that instruction. The appellees endeavored to show, in their words, that "religion is so integral and so substantial a part of the life and meaning and purpose of parochial schools that it is impossible in the statute which grants public funds to support one element to say that the effect of that statute is not to advance religion" (Tr. 16). By contrast, the burden of the appellants' case was that teachers who receive a salary supplement "teach subjects in a secular way with secular books and no different than they would in a public school" (Tr. 20).

The evidence showed that the environment of the Rhode Island Roman Catholic schools differs from that of the public schools in the following respects: The great majority of students are Roman Catholic (Tr. 78; App. 73). Crucifixes are located in most classrooms (Tr. 85, 150, 154; App. 77, 113, 114–115), and religious artifacts and paintings are present in many school buildings (Tr. 85–86, 134; App. 77, 104). But the "decor or decoration of the rooms is what you might say basically the same as you would expect to find in any modern elementary school" (Tr. 134; App. 104). The day is generally begun with a prayer, although there is no set rule on this, and the prayers are increasingly of the

spontaneous, student-composed variety (Tr. 86, 90–91, 102, 135–136; App. 77, 80, 87, 105). There are separate classes for religious instruction (Tr. 87, 133; App. 78, 104). School assembly programs cover a wide range of civic and religious matters (Tr. 95–96, 97, 99; App. 83–84, 85), although assemblies are held relatively infrequently, perhaps three or four times a year (Tr. 133–134; App. 104).

There was also uncontradicted evidence from several witnesses, including the superintendent of the Providence Roman Catholic school system and teachers in that system, that religious and secular instruction are completely and strictly separated. The superintendent stated unequivocally that he did not expect teachers to inject any religious content into secular courses (Tr. 103; App. 87), and the teachers who testified were unanimous in confirming that there was no religious element in any of the secular courses they taught, which included mathematics, science, reading, English and social studies (Tr. 131, 141, 147; see also Tr. 156–157; App. 103, 108, 111; see also App. 116). There was uncontradicted testimony that a teacher of a secular subject might discuss freely any matter that arose in his classroom, even if it had religious overtones, as he saw fit (Tr. 99, 101; App. 85, 86).

All but three or four of the 98 elementary schools in the Providence Diocese are staffed by both lay and clerical teachers (Tr. 76; App. 73).[2] Approxi-

[2] One of the three or four exceptions is composed entirely of lay teachers, and two or three entirely of clerical teachers (Tr. 76; App. 73).

mately one-third of all the teachers in the system are lay (Tr. 77; App. 73), and of these some ten to fifteen percent are non-Catholics (Tr. 81–82; App. 75–76). Two of the teachers who testified were not Catholics (Tr. 141, 151; App. 108, 113). One of them stated that when he was interviewed for the position, he was not asked his religious affiliation, but had volunteered it and had been told that it was irrelevant (Tr. 141–142; App. 108). None of the teachers who testified teaches a course in religion, and teachers who do teach such courses do not apply for a salary supplement (Tr. 88, 131, 141, 147, 152; see also Tr. 156–157; App. 79, 103, 108, 111, 114; see also App. 116).

On the basis of this evidence, the district court found that the "concern for religious values does not necessarily affect the content of secular subjects in diocesan schools" (App. 35).

The district court also received considerable evidence concerning the effect of the Salary Supplement Act on the quality of secular education in the Catholic schools. In 1970, about 29,340 pupils attended the 98 elementary schools of the Providence Diocese (Tr. 77; App. 73). The parents of these children pay tuition, which covers perhaps 40 percent of the total cost of operating the schools; whatever difference remains is generally provided by the individual parishes to which the schools are attached (Tr. 83; App. 76).

Whereas a decade ago all but about eight percent of the teachers in the system were clerics (principally nuns), the percentage of lay teachers has been rising steadily, apparently because of the limited number of

nuns available (Tr. 113–114; App. 92–93); as previously noted (*supra*, p. 7), today one-third of the teachers are lay. Because of higher salaries in the public schools, however, the parochial school system has found it increasingly difficult to recruit qualified lay teachers. Whereas a nun receives $1,800–1,900 per annum, the Providence public schools pay teachers between $7,000 to $11,000 (Tr. 106, 108; App. 89, 90).

Because the revenues available to the parochial system will permit only a salary for a lay teacher in the $5,000 range, the ability of schools to compete for able lay teachers has been severely impaired (Tr. 105–109; App. 88–91). In 1968–1969, the system offered $5,000 per year, but was unable to recruit sufficient teachers with suitable educational backgrounds (Tr. 105; App. 88). If, however, the parochial schools were able to offer salaries within $500 of the rate offered by the public scools—which they believe they can do with the salary supplement and additional contributions from the parishes (App. 92)—it was anticipated that they would be able to obtain competent teachers (Tr. 109; App. 90).

The Salary Supplement Act increased the ability of the parochial system to pay competitive salaries, and after the Act was passed the system offered $6,000 per annum (Tr. 105–112; App. 88–92). The result was "a considerable increase in the quality of the teachers that applied this past year" (Tr. 104; App. 88), as measured by their educational background and teaching experience (*ibid.*).

3. THE DISTRICT COURT DECISION

The district court acknowledged that the Salary Supplement Act "was not intended to advance or interfere with religion" (App. 39), and recognized that its effect was to advance the quality of secular education in Rhode Island's Catholic elementary schools (App. 37). As noted previously, it also found that religious doctrine does not necessarily intrude into classroom instruction in secular subjects (App. 35). The court held, however, that the Act contravened the Establishment Clause, because it "results in excessive government entanglement with religion" (App. 45).[3]

The court held (App. 37) that the statute has the dual effects of (1) "aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools" and (2) "giv[ing] significant aid to a religious enterprise." Expressing concern that "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities" (App. 41), the court declined "to focus solely on the [secular] activity subsidized [by the State] in judging effect" (App. 40). It ruled that under *Walz* v. *Tax Commission,* 397 U.S. 664, the question is "whether the statute furthers 'excessive entanglement' between government and religious institutions," and that "the test of a statute's effect is

[3] The court rejected appellees' claims that the Act impedes the free exercise of their religion, because the appellees demonstrated no coercive effect of the Act on their beliefs or practices (App. 37–38).

not whether the * * * activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards" (App. 41–42).

The court concluded that under this test the Act involves two impermissible elements of government involvement in religion. *First*, it concluded that the annual renewal of the subsidy "will inevitably excite bitter controversy"—a prospect the more likely, the court believed, because of "the continuing financial crisis" of the parochial schools (App. 43). *Second*, the court reasoned that the Act might interfere with the religious freedom of the parochial schools themselves. The court noted that some teachers had stopped teaching courses in religion in order to be eligible for salary supplements, and referred to the possibility that for some purposes the parochial schools might become instrumentalities of the state and hence no longer entitled to discriminate in hiring or admissions (App. 44-45).[4] The court concluded that the "necessary effects of the kind of legislation involved here" was "not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid" (App. 45).

[4] The court rejected the claims of parents that their right to free exercise would be infringed if the quality of secular education available in parochial schools were to decline significantly, and the claim of parochial schoolteachers that State aid to private secular schools alone would deny them the equal protection of the laws (App. 46–47).

Judge Pettine, concurring in the result, agreed that the Act "involves * * * 'reciprocal embroilments of government and religion * * *,'" but disagreed with the court's alternative ground that the Act's effect "is substantially to support a religious enterprise" (App. 48). He stated that there was no evidence of state support for anything but the secular aspects of parochial school education, agreed that *Allen* recognized that the secular and religious functions of those schools could be distinguished, and concluded that the general "mission" or "atmosphere" of the parochial schools is irrelevant (App. 48–50).

ARGUMENT

THE PURPOSES AND EFFECT OF THE SALARY SUPPLEMENT ACT ARE PRIMARILY SECULAR, AND THE ACT DOES NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

INTRODUCTION AND SUMMARY

In our brief, *amicus curiae,* in *Lemon* v. *Kurtzman,* No. 89, this Term, and in our brief in *Tilton* v. *Richardson,* No. 153, this Term, we have discussed at some length the principles and authorities that determine the validity of government aid to church-affiliated schools. We there showed that this Court has recognized three basic principles that control this case.

First, in order to achieve purposes that are essentially secular, the State may take action that involves contact with religious institutions. To distinguish "between forbidden involvements of the State with reli-

gion and those contracts which the Establishment Clause permits," the central question is:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * *

Board of Education v. *Allen*, 392 U.S. 236, 243. See also *Abington School Dist.* v. *Schempp*, 374 U.S. 203; *Everson* v. *Board of Education*, 330 U.S. 1. *Allen* makes it clear that secular instruction can be distinguished from the propagation of religion in church-related schools, and that financial aid for secular instruction is permissible, as long as it is granted under adequate safeguards to insure that a secular effect is achieved.

Second, State action relating to religion is not invalid merely because its effect may be to further the free exercise of religion, provided that such action does not discriminate in favor of particular religions or in favor of religion generally as against non-religion. Thus, while a State is not required to pay the bus fares of all school children, it may do so without regard to whether they attend a denominational school; payment of bus fares for children in religiously-affiliated schools furthers the free exercise of religion and avoids a distasteful, if not a prohibited, discrimination. *Everson* v. *Board of Education*,

330 U.S. 1, 16. See Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 139 (1965). For similar reasons, while the Constitution does not require exemptions for Sabbatarians in those states that have Sunday closing laws, it does not prohibit granting such exemptions. *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (opinion of Chief Justice Warren). See also *Zorach* v. *Clauson,* 343 U.S. 306, 314; cf. *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 306 (concurring opinion of Mr. Justice Goldberg).

This Court recently said: "The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission,* 397 U.S. 664, 673. On this basis, the Court in *Walz* construed New York's exemption of churches from taxation as a valid attempt to "spar[e] the exercise of religion from the burden of property taxation levied on private profit institutions," rather than an attempt to establish religion. *Ibid.*[5]

Third, although *Allen* recognizes the need for safeguards to insure that a secular goal does not in practice actually foster or impede religion, *Walz* indicates that excessive governmental involvement may invalidate a government plan of assistance to religious en-

[5] The conclusion in *Walz* that government may accommodate religion more permissively than it may interfere with its exercise finds substantial support in the history of the religion clauses of the First Amendment. See generally Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (1965).

tities. "[T]he questions are whether the involvement is excessive, and whether it is a continuing surveillance leading to an impermissible degree of entanglement." 397 U.S. at 675.

The district court concluded, however, that rather than merely adding the qualification stated in the preceding paragraph, *Walz* made a "significant refinement" in the "purpose and effect" test this Court had applied in previous decisions. *Walz,* according to the district court, "makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards" (App. 42). "Judged by this standard" (*ibid.*), the court concluded, the Salary Supplement Act involved a forbidden degree of government entanglement.

We show in Point B, below, that the Act does not violate that precept. But the district court also erred in its interpretation of *Walz.* For in *Walz* the Court cited *Allen,* with apparent approval, for the statement that supplying "costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment" (397 U.S. at 672). The Court also stated (p. 669): "Each value judgment under the Religious Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have

the effect of doing so"—a formulation that embodies the purpose and effect test. *Walz* thus adds to the purpose and effect test the additional test of excessive involvement—but does not replace or modify the former standard.

On both standards, we submit that the Rhode Island statute is consistent with the Establishment Clause. As we show below, (1) the statutory purpose was to meet the serious educational problem of maintaining the quality of secular education in religiously-affiliated schools. The competence of teachers of secular subjects and the quality of instruction in those subjects are of legitimate legislative concern. The effect of the statute, as the district court recognized, also is secular; religion does not intrude into secular instruction in the Rhode Island parochial schools, and the statute has improved the quality of that instruction. (2) The Rhode Island statute contains adequate safeguards to insure that it does not entangle the State excessively in religion.

A. THE ACT HAS THE SECULAR PURPOSE AND EFFECT OF MAINTAINING THE QUALITY OF SECULAR INSTRUCTION PROVIDED TO ELEMENTARY SCHOOL STUDENTS ATTENDING CHURCH-RELATED SCHOOLS

1. The district court found that the Salary Supplement Act "was not intended to advance or interfere with religion" (App. 39). The court accepted the legislative declaration that its purpose was "to provide a quality education for all Rhode Island youth, those in public and nonpublic schools alike," § 16–51–1, and declined to "divine the 'true intent' of the legislature by inspecting the activities of lobbyists" (App. 39).

So viewed, the court had "little difficulty" in finding that the legislature's "concern for the quality of education afforded to Rhode Island youth" was "legitimate" (App. 39–40).

This conclusion was correct. In *Allen*, this Court, sustaining a New York statute providing for the loan of textbooks to pupils in church-related schools, held the "furtherance of the educational opportunities available to the young" to be a proper, secular legislative purpose. 392 U.S. at 243. *Allen* indicated that the "stated purpose" of the legislature is determinative of its intention. *Ibid.* This holding is consistent with the long-standing prohibition on judicial scrutiny of the motives of legislators or the underlying compromises and accommodations that shape the contours of particular statutes. *United States* v. *O'Brien*, 391 U.S. 367, 383; *McGowan* v. *Maryland*, 366 U.S. 420, 496 (opinion of Mr. Justice Frankfurter); *Barenblatt* v. *United States*, 360 U.S. 109, 132–133; *McCray* v. *United States*, 195 U.S. 27, 56.

The secular purpose of the Rhode Island Act is also reflected in the legislative concern over the quality of the education of those children whose parents choose to enroll them in a church-related school. As we have shown in our briefs in *Tilton* v. *Richardson*, No. 153, this Term (pp. 26–28), and *Lemon* v. *Kurtzman*, No. 89, this Term (pp. 18–19), this is a proper subject of legislative concern.

As the legislative findings state, nonpublic schools were experiencing great difficulty in paying the salaries required to attract teachers of professional background comparable to those employed in the public

schools. See § 16–51–1. The record in this case confirms the seriousness of the problem (see the Statement, *supra,* pp. 7–8). Rather than force religiously-inclined parents and pupils to a reluctant choice between their religious beliefs and their secular education, Rhode Island chose to aid the latter without touching the former.

Like the Pennsylvania Act challenged in *Lemon,* therefore, the Rhode Island Act rests on two related secular bases. First, since the State cannot compel attendance at public schools, *Pierce* v. *Society of Sisters,* 268 U.S. 510, it may undertake to support the quality of secular education offered in nonpublic schools. See *Allen, supra,* 392 U.S. at 247. Second, it may especially do so where its action obviates the need for parents who wish a religious education for their children to sacrifice the quality of the instruction they receive in those schools.

2. Given the validity of these purposes, the only question is whether there is anything "about the necessary effects of the statute that is contrary to its stated purpose." *Allen, supra,* 392 U.S. at 243. The court below found that the statute had two significant effects. On the one hand, it acknowledged that the Act would assist in maintaining secular educational standards in Catholic schools. On the other, it saw the Act as aid "to a religious *enterprise*" (App. 37; emphasis supplied), and on that ground held the Act invalid.

Allen makes it clear, however, that the focus of the inquiry is not on the entire "religious enterprise." If it were, then all aid would be impermissible, since it

necessarily has the effect of assisting that total enterprise. Instead, *Allen* recognized that church-related schools "are performing, in addition to their sectarian function, the task of secular education," 392 U.S. at 248, and the question is whether State assistance to the "secular education" "task" constitutes "unconstitutional involvement of the State with religious instruction" (*ibid.*).

The district court stressed the benefits that inure to the parochial schools from having their religious and secular aspects in close spatial and temporal proximity to each other. Stating that "the Church gains special advantage from a curriculum which contains both religious and secular subjects," the court noted the religious benefits that flow from the existence of high standards in secular education (App. 36–37). From this it concluded that although religious doctrine does not permeate secular instruction in Rhode Island,

> the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation. It also seems clear to us that this essentially religious enterprise cannot succeed without good teaching in secular subjects. If the quality of teaching falls too low, then not only will Catholic parents be reluctant to enroll their children, but the parochial schools could also run afoul of Rhode Island's education laws. * * * [App. 36–37.]

This reasoning is inconsistent with the ruling in *Allen* that, merely because State assistance may make church-related schools more attractive and in that way further their religious mission, the aid is not for that reason impermissible.

The district court here stated that by equalizing standards of secular instruction, the Rhode Island Act probably would diminish the reluctance of parents to send their children to such schools. But in *Allen* this Court said: "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244. Thus, State assistance stemming from a valid secular purpose is not unconstitutional merely because it may constitute an incidental aid to the recruitment or retention of students in religiously-affiliated schools. All such aid is likely to have that effect, and under the district court's analysis all State aid, no matter how secular its purpose, would be invalid because of its collateral effect of making the church-affiliated school a better and more attractive educational institution. It was for that reason, we believe, that *Schempp* and *Allen* properly emphasized the primary effect of the aid.

Allen indicates that a major concern of the Court was the possibility that in some parochial school systems the religious and secular instruction might be so intertwined that State assistance to the secular component necessarily would constitute forbidden govern-

ment support of religion. For in upholding the New York textbook law, *Allen* relied to a large extent on the absence of any evidence of intermingled or inseverable functions. "Nothing in this record," said the Court, "supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books." 392 U.S. at 248. The Court in *Allen* declined to hold as a matter of law that the sacred and the secular were necessarily intertwined in church-related schools:

> Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. * * * [Ibid.]

In the present case appellees undertook to prove that a separation of secular and religious instruction was impossible in the Rhode Island Roman Catholic schools. They failed to do so. As the court below recognized at several points (App. 35–36), the evidence was to the contrary. Although, as stated above (*supra*, pp. 5–6), the Providence diocesan schools share many elements of daily routine, decor, curriculum and instruction with public elementary schools, they also have aspects, such as sacred symbols, homeroom pray-

ers, and periods of religious instruction, which are peculiar to church-affiliated schools.

But there was no evidence that secular instruction in those schools is permeated with religious dogma or even sectarian points of view. Quite the contrary: the uncontradicted testimony was that secular teachers are not expected to impart religion in secular subjects, do not do so in practice, and are completely free to teach their subjects in their own way. The court below accepted this testimony, which it said "gains added credibility from the fact that several of the teachers were non-Catholics" (App. 35). Thus, the record in the present case establishes that religion does not permeate secular teaching in the Rhode Island parochial schools. In *Allen*, the Court would not presume that the statute "results in unconstitutional involvement of the State with religious instruction * * *" 392 U.S. at 248. Here the appellees could not demonstrate that it does.

Nevertheless, the district court found the "concern for religious values" (App. 35) exhibited by diocesan schools to be constitutionally significant, for it meant that among "the necessary effects of the kind of legislation involved here" is "substantial support for a religious enterprise" (App. 45). This determination, based solely upon the "atmosphere" of the school as a whole and not upon any evidence of the intrusion of religion into secular teaching, is inconsistent with *Allen* (App. 48–49). When this Court decided *Allen*, it obviously understood that church-related schools exist in part to perpetuate the faith and to foster thought and conduct in conformity with it. Clearly, it knew,

too, that church-related schools are sometimes located adjacent to churches, that religious symbols sometimes adorn their walls, and that they give courses in religion. Yet this Court declined to invalidate State assistance to secular instruction in church-related schools on those grounds.

3. In holding that the New York Textbook Act properly effectuated its secular purpose, *Allen* emphasized the structure of the statutory scheme. In our *Lemon* brief we pointed out that the Pennsylvania statute there involved was narrowly drawn to avoid the possibility that the State might in practice be subsidizing the teaching of religion and to insure that the Act's secular objectives are being fulfilled. We stressed the statutory prohibition on the teaching of religion, the limitation of the reimbursment provisions to four subjects far removed from religious controversy, the requirements that teachers seeking reimbursement be certified by public authorities and that pupils be subjected to standardized examinations. See our *Lemon* brief, pp. 20–21.

The Rhode Island statute challenged here contains many of the same safeguards and others as well. A teacher who receives a salary supplement must agree in writing not to teach a course in religion for the duration of his supplement. § 16–51–3(5). He must be certified by the State education authorities in the same manner as public school teachers, § 16–51–3(2), thus assuring that his professional qualifications equal those of his colleagues in the public schools. The subjects taught may be only those taught in public schools, and they must be taught "only [with] teaching materials used in the public schools of the state."

§§ 16–51–3(1), 16–51–3(4). Thus, while the permissible subjects a teacher receiving aid may teach are somewhat broader in Rhode Island than in Pennsylvania, he may use only those non-religious materials that are permitted in the Rhode Island public schools—a substantial guarantee of secularity.

Finally, whereas Pennsylvania's statute permits salary reimbursement in full, Rhode Island's provides only a 15 percent salary supplement. § 16–51–4. The evidence in the record shows that this amount would barely suffice to enable the parochial schools to compete for able teachers but would not allow displacement and reallocation to religious purposes of funds that would otherwise be spent for the salaries of teachers of secular subjects (Tr. 112; App. 92).[6] Like the statute sustained in *Allen* and the one challenged in *Lemon*, the Salary Supplement Act contains adequate provisions designed to limit the aid to the purely secular instruction in the quality of which the State has a compelling interest.

B. THE ACT DOES NOT CREATE EXCESSIVE GOVERNMENT ENTANGLEMENT IN RELIGION

This Court in *Walz* indicated that the Establishment Clause forbids "excessive government entangle-

[6] It is clear, moreover, from *Walz* that financial benefit to religious institutions is not the touchstone of constitutionality. *Walz* pointed out that in *Allen* "making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment" [397 U.S. 664, 671–672].

ment with religion." 397 U.S. at 674. It further recognized that the question of entanglement "is inescapably one of degree," a matter of determining "whether the involvement is excessive * * *." *Id.* at 674, 675. The safeguards required by *Allen* must be balanced against the entanglement proscribed by *Walz*.

If Rhode Island permitted the serious financial situation of church-related schools to worsen, the result might have been a deterioration of the quality of secular instruction that would have led some parents to transfer children to the public schools despite their religious convictions. Indeed, at some point the State education authorities might have to investigate the secular education offered at church-related schools to determine whether they should continue to be certified as meeting minimum standards. On the other hand, the State's program of assistance for secular instruction necessarily involves some government involvement; as *Allen* indicates, there must be safeguards to prevent misdirection of funds to religious uses. The issue is whether the involvement required by the particular Rhode Island safeguards is "excessive."

The court below ruled that it is. It concluded that the annual renewal of salary supplements is likely to engender religious strife, and it foresaw that the Act would cause "significant state limitations on the freedom of denominational schools" (App. 43).

1. We have discussed the divisiveness argument in our *Lemon* brief (pp. 22–24). There we pointed out that the argument is conjectural and underestimates the traditional and continuing role of religious groups

in the political process and the ability of that process to accommodate the religious demands within the confines of the established doctrine that assistance is permissible only for secular functions. There is no reason why salaries for secular instruction are more likely to prompt widespread religious bitterness than, for example, the longstanding disputes over birth control, temperance, divorce or abortion, all of which have involved the interaction of religion with politics.

2. The district court held that the Salary Supplement Act interferes unduly with the internal affairs of religious bodies in three respects.

a. The court was concerned that the State "must monitor parochial school expenditures and in close cases determine which spending is 'religious' and which is 'secular' " (App. 43), because the Act excludes from its coverage those schools "whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year for school operations * * *." § 16–51–2(1). The court foresaw that the per student expenditure requirement might create disputes over what was secular and what religious, and might even "influence the allocation of church resources as the parishes tailor their spending to meet the Commission's criteria" (App. 44). While there may be borderline cases, the need to make the distinction does not invalidate the plan. Moreover, such a distinction has thus far been required at most only once: there has been only one school whose

teachers were denied salary supplements because its expenditures were too high (Tr. 125; App. 99–100). The parochial schools, which educate 95 percent of all children in nonpublic schools in Rhode Island (App. 32), appear uniformly to come within the expenditure limits.

b. The court suggested that the Act would restrict the role of teachers, for example, by inducing them to abandon teaching of religion to qualify for the subsidy (App. 44). But the statutory provision that teachers cannot teach religion in the school while they receive a supplement[7] is the same restriction under which teachers in public schools operate. It does not go beyond what is reasonably required to insure that the funds are used solely for secular purposes, as *Allen* requires.

c. Finally, the court suggested that State assistance might render parochial schools State agencies for Fourteenth Amendment purposes and restrict their ability to discriminate in selecting teachers and students on religious grounds (App. 44–45). But the Rhode Island parochial schools do not limit their teaching staffs to Catholics (see Tr. 141–142; App. 108): 10–15 percent of the teachers are non-Catholic (Tr. 81–82; App. 75–76). If religious criteria are used in the selection of teachers or students (and the record appears to be silent on the latter), the schools may contend that such discrimination is protected by the Free Exercise Clause. In any event, the choice whether to accept state funding in these circumstances

[7] The certification conditions imposed by the Act are reasonable and unrelated to religious freedom.

appropriately may be left to the institutions themselves; the problems that concerned the district court do not demonstrate an impermissible degree of government involvement in religion.

Indeed, several of the most important safeguards of the Act involve no significant government entanglement in religion at all. Thus, whether the subjects taught and the material used are the same as those in the state public schools, and whether the teachers are qualified to teach in the public schools, are matters capable of easy ascertainment by objective standards and involve no supervision or scrutiny of the classroom. The basic assurance that the instruction in religiously-affiliated schools for which Rhode Island provides salary supplements is both secular and of high quality does not involve significant government intrusions into the affairs of the diocese or the parish.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JANUARY 1971.

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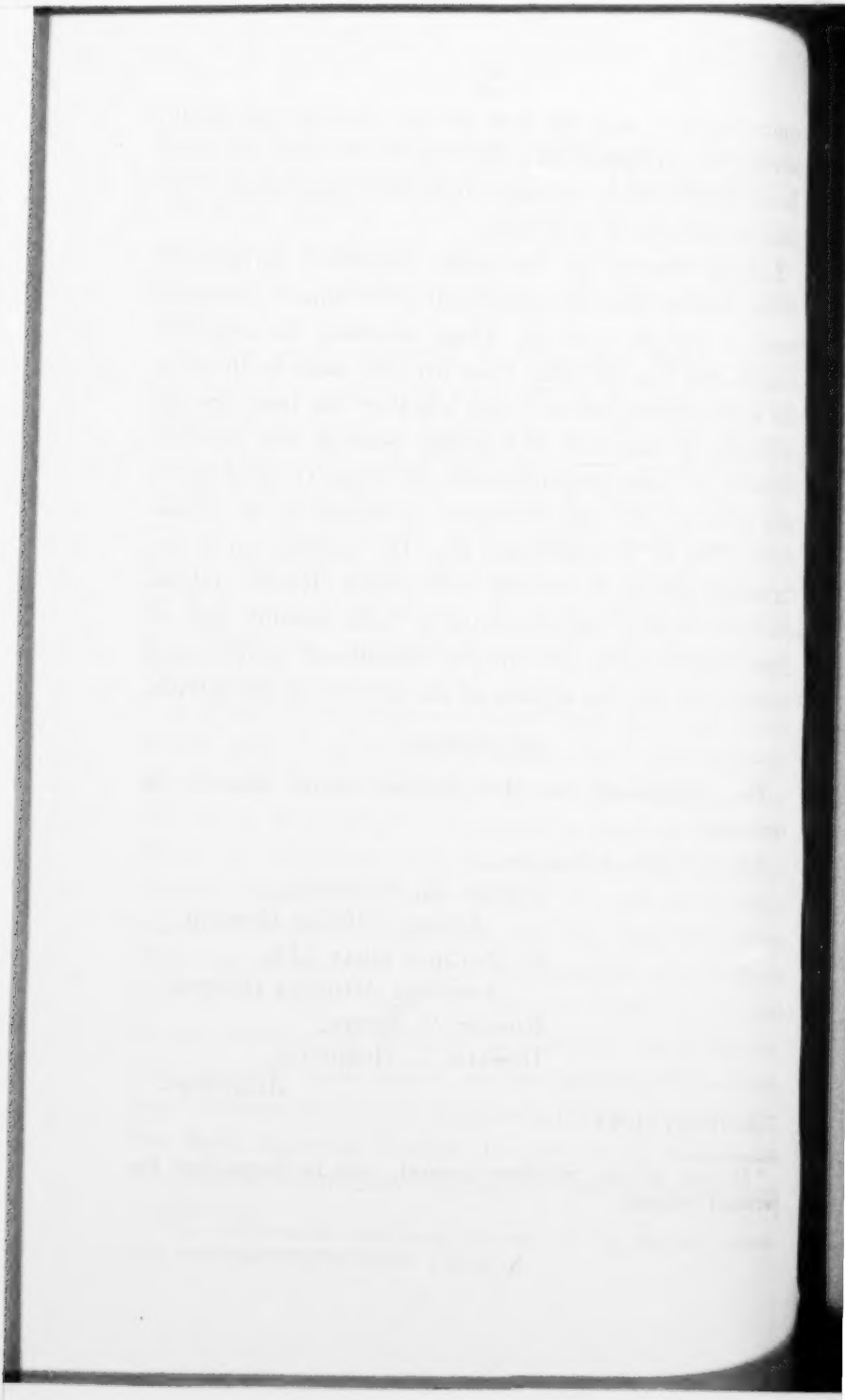

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IN THE

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OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, ET AL., *Appellants*,

v.

JOAN DICENSO, ET AL., *Appellees*.

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, ET AL., *Appellants*,

v.

JOAN DICENSO, ET AL., *Appellees*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE NATIONAL ASSOCIATION OF EPISCOPAL SCHOOLS, THE NATIONAL UNION OF CHRISTIAN SCHOOLS, THE NATIONAL CONFERENCE OF YESHIVA PRINCIPALS, AND THE LUTHERAN EDUCATION ASSOCIATION, AMICI CURIAE

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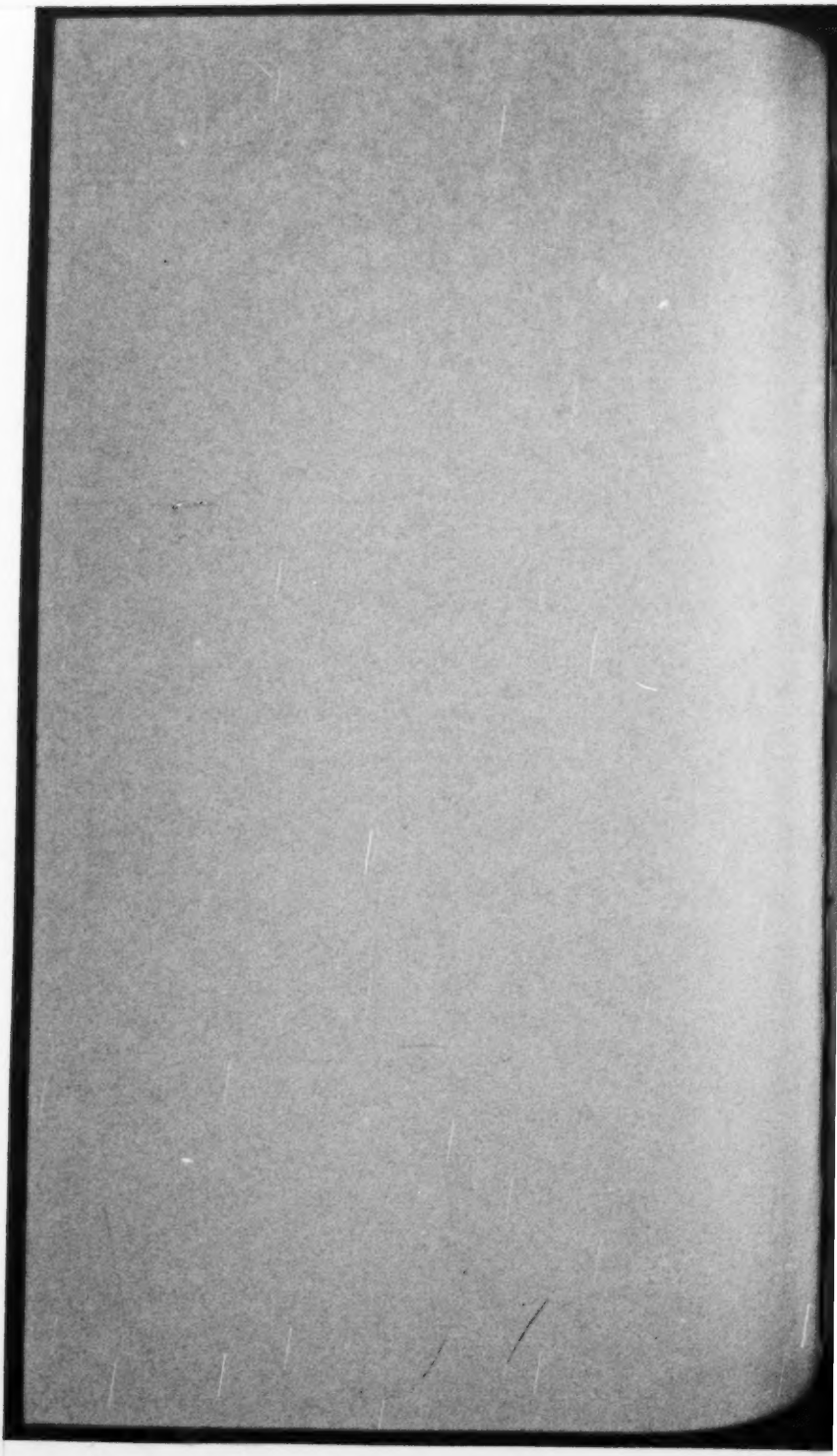

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

---

1. The National Catholic Educational Association, the National Association of Episcopal Schools, the Lutheran Education Association, the National Union of Christian Schools and the National Conference of Yeshiva Principals, *amici curiae* herein, are national, nonprofit educational organizations. The schools which the *amici* represent, though church-related, comply with the educational requirements of the states in which they are located. More than 45,000 children attend nonpublic elementary schools in Rhode Island, and those children constitute over 25% of the total school population at this age level.

2. Pursuant to Rule 42(3) of the Rules of this Court, consent to the filing of this brief was requested of the parties to both of these cases by letter of December 14, 1970. All the parties to both cases have consented to the filing of this *amicus* brief except the appellee.

3. The appellants in these cases are the State officials responsible for implementing the challenged statute, several teachers who are the recipients of salary supplement payments, and two parents whose children attend schools which derive benefits from the Salary Supplement Act. None of the parties represent directly the interests of those nonpublic schools which derive tangible benefits from the Salary Supplement Act or similar legislation in force in other states. The Salary Supplement Act has as its avowed purpose the improvement of the quality of secular education in Rhode Island's nonpublic schools, an interest which the schools represented by the *amici* share and seek to implement along with the State of Rhode Island. *Cf. Cochran* v. *Louisiana,* 281 U.S. 370 (1930). This brief is submitted so that the views of those schools may be heard on the important constitutional issues presented in this litigation.

4. The constitutional contentions asserted in these cases affect the *amici* who represent more than 10,000 church-related schools throughout the country wherein approximately 5½ million children are currently receiving a complete secular education in addition to certain aspects of religious instruction. The maintenance of quality education in these schools, in a period of spiraling educational costs, requires some financial assistance from the state for secular programs.

5. The *amici* strongly believe that the educational system of this country should be pluralistic in nature and should be flexible enough to accommodate educa-

tional institutions which are church-related. The *amici* currently fear that the impact of the spiraling costs of education threaten the very existence of a meaningful system of educational pluralism. The *amici* further believe that it is equitable and appropriate for state revenues to be used to assist the secular aspects of church-related schools so that American children of all faiths will be afforded similar educational opportunities and will thereby contribute to the development and growth of the United States.

6. The principal constitutional argument made in this brief has not, to the best of our knowledge, been made in the briefs of any of the parties. Specifically it is contended that the entanglement criterion in the case of *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664 (1970), may be more readily viewed as an element for judging non-secular statutes under the Establishment Clause whose purpose and effect is to favor or accommodate religion.

CONCLUSION

For the foregoing reasons the Motion for Leave to file the attached brief *amicus* should be granted.

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BRIEF FOR

THE NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE NATIONAL ASSOCIATION OF EPISCOPAL SCHOOLS, THE NATIONAL UNION OF CHRISTIAN SCHOOLS, THE NATIONAL CONFERENCE OF YESHIVA PRINCIPALS, AND THE LUTHERAN EDUCATION ASSOCIATION, AMICI CURIAE

INTERESTS OF THE AMICI CURIAE AND THEIR POSITION ON THE ISSUES

A. *Identification of the Amici.* The five *amici curiae* in whose behalf this brief is submitted are nonprofit educational associations. They represent some 6,000,000 children enrolled in more than 14,000 schools which are

served by nearly 250,000 teachers and staff. All five associations are dedicated to fostering and protecting the principals and ideals of American education, improving the quality of that education and preserving its accessibility to and influence on the youth of the Nation.

The National Catholic Educational Association (NCEA) is a voluntary organization founded in 1904. It is the oldest and largest professional organization of Catholic educators in the United States. NCEA serves 5,500,000 students, 206,000 educators and over 14,000 institutions, at all levels and in all areas of Catholic education. NCEA is governed by a Board of Directors, six of the members of which are elected by a Body of Delegates, composed of 15 representatives of each of the six existing departments of NCEA. The Delegates also elect the officers of the organization. Nine members of the Board of Directors are elected by the two present divisions of NCEA, that of Higher Education and that of Fundamental Education.

The National Association of Episcopal Schools is a nonprofit organization chartered in the State of New York. Membership in the Association is voluntary. Member schools are Episcopal schools owned or operated by, or under the jurisdiction of, a cathedral, dioceses, religious community or other recognized Episcopal organizations. Associate membership may be granted to schools which are not church-related but sympathetic to the aims and purposes of the Association.

The National Union of Christian Schools (NUCS) is a nonprofit educational association chartered in Michigan. It has been in existence for more than half

a century. Almost 300 schools located in 26 states, as well as in Canada and Mexico, are affiliated with NUCS. Forty-two of the schools are high schools. Over 60,000 pupils attend schools affiliated with NUCS, and the total number of teachers and administrators on the staffs of these schools exceeds 2,700. Schools affiliated with NUCS are owned by associations of parents. They are operated on the principle that the parents have a primary responsibility for the education of their children.

The National Conference of Yeshiva Principals is the only national professional organization of principals of Yeshiva Hebrew day schools in the United States. The Conference is made up of the principals of 405 schools in 165 communities located in 30 states. These schools have an enrollment of some 80,000 students. The Conference is governed by a Board of Directors consisting of 18 members who are elected biannually at the national convention of the Conference.

The Lutheran Education Association (LEA), a voluntary organization, was founded 27 years ago to support Christian education and to serve the Christian educator. LEA is the only professional organization for educators in the Lutheran elementary and secondary schools. LEA serves 174,931 students, 1,271 institutions, and 7,704 educators in 43 states. The active membership of LEA numbers 2,714 and is composed of ministers of education, pastors and laymen. The Association is governed by nine board members, seven of these are elected by the total membership and two are on the board as representatives of specialized departments—directors of Christian education and principals of Lutheran elementary schools.

B. *The Concern of the Amici and Their Position on the Issues Raised.* The *amici* are aware that it is their association with religious organizations which lies at the heart of appellee's challenge to the eligibility of nonpublic school teachers to participate in the program of salary supplements provided under Rhode Island General Laws, Sec. 16-51-1. This is of special concern to the *amici* for the salary supplement law was designed to promote quality education in the nonpublic schools of the State which comprise about 25% of the total school population at the elementary level.

In developing their constitutional arguments, the *amici* see no need to belabor two fundamental and extremely relevant propositions of ultimate fact made by the appellants in this case and previously accepted and applied by the Court, most recently in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). These are: (1) that religious-related schools of the type for whom these *amici* speak "play a significant and valuable role in raising national levels of knowledge, competence and experience"; and (2) that such "schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 247.

It is to the relief of the pressing problem of preserving the quality secular educational services the private schools carry on that the legislatures of a number of states, including Rhode Island, have recently addressed themselves. Various statutory programs have been proposed, and some enacted, for the purpose of assisting nonpublic secular education, including the nonpublic secular education offered at the religious-related school. These programs are aimed at preserving and improving secular education, not at aiding churches or establishing religions. This case involves the constitutionality of one such program, that adopted by Rhode Island. There, limited assistance to nonpublic

secular education is provided through payment of salary supplements by the state to qualified nonpublic school teachers engaged in solely secular educational functions.

It is the position of these *amici* that: (1) the extension of salary supplements to those engaged in teaching secular subjects in nonpublic schools stimulates quality education in these schools; (2) the Rhode Island statute represents an effective and constitutional coordination of parental and State rights and interests; (3) the statutory program of moderate salary supplements does not in any way compromise the independence of church-related schools nor involve them in an unconstitutional relationship with the State; and (4) the purpose and primary effect of the legislation is the assisting of secular activities, not religious activities; and the Act does not involve any "excessive governmental entanglement" in religion or religious activities.

INTRODUCTORY STATEMENT

Appellants in this case have filed a lengthy and comprehensive brief, fully and carefully considering the relevant factual and legal issues involved and persuasively addressing the arguments advanced by appellees and by the court below. It is not the intention of this *amicus* brief to reiterate that presentation. Rather, our principal purpose is to examine the doctrinal implications of this Court's recent opinion in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), as they relate (1) to the Establishment Clause "test" fashioned by the Court in *Abington School District* v. *Schempp,* 374 U.S. 203 (1963), reaffirmed in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), and (2) to the specific subject of state financial assistance to church-related schools now before the Court.

SUMMARY OF ARGUMENT

I. The lower court's reading of the *Walz* "excessive government entanglement" criterion as superseding the *Schempp-Allen* test is erroneous.

II. Appellants' interpretation of the *Walz* criterion as amplifying the *Schempp-Allen* test in respect to statutes with a secular purpose and effect is persuasive, and appellants' demonstration that the statute before the Court satisfies the *Schempp-Allen* test as enlarged by *Walz* is conclusive.

III. The *Walz* criterion may be more readily viewed as a newly formulated element for judging nonsecular statutes under the Establishment Clause whose purpose and effect is to favor or accommodate religion.

IV. Adequate state administrative controls are ordinarily a constitutional requirement under the Establishment Clause in connection with government programs that provide financial aid to the secular functions of church-related institutions.

ARGUMENT

I.

The court below construed language in the *Walz* opinion as significantly modifying and effectively superseding the clearly stated *Schempp-Allen* test. It is true that the *Walz* opinion did not specifically set forth the exact language of this carefully developed test "for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits." (*Allen*, 392 U.S. at 243.) But it is manifestly unthinkable and wholly unreasonable to believe that *Walz* implicitly repudiated this broad standard that the Court had

evolved over a score of years for reviewing Establishment Clause issues.

"The [*Schempp-Allen* test is] as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (374 U.S. at 222; 392 U.S. at 243.)

In *Walz*, the Court further stated: "We must *also* be sure that the end result—the effect—is not an excessive government entanglement with religion." (397 U.S. at 674; emphasis added.)

II.

Appellants' Brief (No. 569, pp. 27-38) forcefully establishes that the purpose and primary effect of the Rhode Island Salary Supplement Act fully satisfies each requisite of the *Schempp-Allen* test.[1] In doing

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[1] Note might here be taken of the lower court's fear, in invalidating the Rhode Island statute, that upholding it "could pave the way for almost total subsidy" of the secular education provided by church-related schools. (316 F.Supp. at 120.) Several objections must be made to this "foot in the door" or "nose of the camel in the tent" contention. (See *Walz*, 397 U.S. at 678.) The most obvious is that the Court should consider only the case presently before it. Even if this Court were to believe that Establishment Clause problems might be posed by some future, hypothetical, more extensive state financial assistance program—despite the fact that the program had a secular purpose and primary effect—the proper time for the Court to address that problem would be when it arises. As the Court said in *Walz*, in respect to arguments of this sort, "any move which realistically 'establishes' a church or

so, appellants view the *Walz* statement as amplifying the meaning of the *Schempp-Allen* standard—necessitating inquiry as to whether a statute, which has a "secular legislative purpose and a primary effect" that does not "advance" religion, may, nonetheless, have "a primary effect that . . . . *inhibits* religion" if the statute engenders "an excessive government entanglement" with the religious institution that is the beneficiary of the state's secular program.

As will be demonstrated in the following paragraph, *if* the *Walz* statement was meant by the Court to be engrafted upon the *Schempp-Allen* test for reviewing statutes such as Rhode Island's that have a secular purpose, then appellants' interpretation is not merely a persuasive reading of the doctrinal development. It is the only logical or sensible reading. Any other reading of *Walz,* in respect to a statute such as Rhode Island's that has a secular purpose, would result in a distortion or repudiation of the *Schempp-Allen* test. This was essentially the course taken by the court below.

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tends to do so can be dealt with 'while this Court sits.'" (397 U.S. at 678.)

However, because of the lower court's expressed apprehension, it is appropriate to comment on the unlikelihood, in view of political reality and the current severe demands being made on the public fisc from all sources, of a state providing anything even approaching full support for the secular educational functions of nonpublic schools. Certainly this Court should not permit unrealistic hypothetical possibilities to thwart Rhode Island's legitimate secular efforts "to provide a quality education for all Rhode Island youth." (R.I. Gen. Laws § 16-7-15.) As has been shown in Appellants' Brief and will be shown herein, the Salary Supplement Act threatens no values protected by the Establishment Clause. Rather, it both furthers the pluralistic aims of our society and facilitates the religious liberty of children whose faith either requires or encourages attendance at schools that provide religious instruction in addition to secular training.

If the Salary Supplement Act has a secular purpose—and such was the unanimous conclusion of the court below—"excessive government entanglement with religion" may bear only on whether the statute *inhibits* the religious liberty of the institutions which benefit from it. As a matter of logic, linguistics and common sense, any government relationships with religious organizations, in respect to administration of such a statute, that may be viewed as "entanglement" or "involvement," cannot *advance* religion. They may only *inhibit* religion.

Walz explicitly recognized this in saying that "the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools" may threaten "the autonomy and freedom of religious bodies." (397 U.S. at 672.) The court below noted the possibility that certain involvements might "represent a substantial limitation on the freedom of parochial schools to set their own curriculum." (316 F. Supp. at 121.) Indeed, *excessive* or *unreasonable* state involvement with church-related schools, with or without public financial assistance, could also be found to violate the Free Exercise Clause. *Cf. Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). This issue of infringement of religious liberty would most quickly surface if the state sought to control or supervise the *religious* aspects of education in church-related schools. Observe the Court's caution in *Allen* against "unconstitutional involvement of the State with religious instruction" (392 U.S. at 248), and the Court's dictate in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), that the state may not "condition the availability of benefits upon . . . [the recipient's] willingness to violate a cardinal principle of . . . religious faith." (374 U.S. at 406.)

But this issue of *inhibition* of religious liberty is nowhere present in this case because it has never been raised by the only persons—the church-related schools which benefit from the enactment—whose rights and interests may be affected as a consequence. These church-related schools have not contended that the Salary Supplement Act unduly interferes with their religious liberty or autonomy because, as Appellants' Brief (No. 569, pp. 52-60) saliently shows, the Act does not inhibit religion through either excessive or impermissible government entanglement or involvement. Nor has this occurred under the much longer federal experience of providing financial assistance to all levels of church-related education with continued administrative supervision.

III.

But, apart from appellants' reasoned interpretation, the Court's statement in *Walz* may be seen from a somewhat different perspective. The *Walz* "excessive government entanglement" criterion may be viewed in the context of the specific type of Establishment Clause problem before the Court in *Walz, i.e.,* a statute that did *not* have a "secular legislative purpose." Having earlier acknowledged that the *Schempp-Allen* test "is not easy to apply" (392 U.S. at 243), the *Walz* statement may more readily be interpreted as newly formulating an important standard for judging statutes under the Establishment Clause whose purpose and primary effect is to favor or accommodate religion.

A. Several of the important Establishment Clause cases previously decided by this Court involved state statutes—like the statute now before this Court, as clearly admitted by the court below (316 F. Supp. at

118, 119)—that had both a secular legislative purpose and a primary effect that was secular—*Everson* v. *Board of Education,* 330 U.S. 1 (1947); *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Board of Education* v. *Allen.* In both *Everson* and *Allen,* the statutes—like the statute now before the Court—provided financial assistance to *secular* functions of church-related schools. The statutes, because of their *secular* purpose and effect, were held not violative of the Establishment Clause. As the Court noted in *Walz,* "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in *religious* activity." (397 U.S. at 668; emphasis added.) The statutes in *Everson* and *Allen* were upheld due to their secular purpose and effect even though they afforded substantial incidental "aid" to religion "to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." (*Walz,* 397 U.S. at 671; see also *Everson,* 330 U.S. at 17; *Allen,* 392 U.S. at 242, 244.) As the Court noted in *Walz,* "supplying of costly teaching materials [and bus transportation] was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment." (397 U.S. at 672.) For, as Mr. Justice Frankfurter, joined by Mr. Justice Harlan, said in *McGowan* (366 U.S. at 468)—and as reiterated last Term by Mr. Justice White, joined by The Chief Justice and Mr. Justice Stewart, in *Welsh* v. *United States,* 398 U.S. 333, 369 (1970)—"an establishment contention 'can prevail only if the absence of *any* substantial legislative purpose other than a religious one is made to appear. . . .' " (Emphasis added.)

B. The statute in *Walz* granted "property tax exemptions to religious organizations for religious properties used solely for religious worship." (397 U.S. 666.) Unlike the statutes discussed above and the statute involved in this case, this tax exemption did *not* have a *secular* purpose and effect. The Court specifically found it "unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform." (397 U.S. at 674.)[2] The Court explicitly recognized that the state had adopted "an affirmative policy" of favoring "all houses of religious worship" among other entities due to their "beneficial and stabilizing influence in community life." (397 U.S. at 673.) But, even though the property tax exemption had no secular legislative purpose or effect, it was held not to violate the Establishment Clause because its purpose was "neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." (397 U.S. at 672.) Rather, its *purpose* was to accommodate or favor religious exercise and it withstood Establishment Clause attack because its *effect* did not pose those dangers to religious liberty generally—sponsorship or support of, or excessive government entanglement with, religion—that the First Amendment was meant to prevent.[3]

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[2] To uphold the statute, Mr. Justice Brennan, in a separate concurring opinion, *did* specifically rely on this factor as one of "two basic secular purposes for granting real property tax exemptions to religious organizations." (397 U.S. at 687-689.) Discussion of Mr. Justice Brennan's other "secular purpose" is found in footnote 3 *infra*.

[3] Mr. Justice Brennan found that tax exemptions to religious organizations serve a second "secular" purpose because religious institutions "contribute to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." (397 U.S. at 689.) But he was clearly conscious of his unusual use of

C. The *Walz* decision is consistent with a long-standing, although perhaps not expansively articulated, position of the Court that government action which favors or accommodates religious interests is not necessarily violative of the Establishment Clause even though it has no secular purpose or effect. Indeed, such action by government may be required in certain instances to avoid a violation of the Free Exercise Clause. For the "neutrality" imposed by the Religion Clauses of the First Amendment "is not self-defining." *Welsh* v. *United States,* 398 U.S. at 372 (1970) (opinion of Mr. Justice White).

Mr. Justice Goldberg, joined by Mr. Justice Harlan, stated this view in *Schempp:* "But untutored devotion to the concept of neutrality can lead to invocation or

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the word "secular" in characterizing this second purpose: "It is true that each church contributes to the pluralism of our society through its *purely religious* activities, but the state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation." (397 U.S. at 693; emphasis added.) Such a "secular" purpose is of a wholly different quality from the secular purpose in *Everson, Allen* and the statute now before the Court. See Note, 84 Harv. L. Rev. 128-129 (1970). To characterize such a purpose as "secular" is simply to conclude that a statute whose purpose is to favor or accommodate religious activities need not violate the Establishment Clause if its effect poses no dangers to those values underlying the Religion Clauses of the First Amendment. In a similar vein, statutes exempting persons with particular religious beliefs from general civil regulations in order not to violate the free exercise of their religion, which clearly have the purpose of "accommodating" or "encouraging" or "aiding" religion, may be characterized as having a "secular" or "nonreligious" purpose; such a characterization is simply a statement of the conclusion that such state action is required by the Free Exercise Clause and not prohibited by the Establishment Clause. See Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 Minn. L. Rev. 329, 395-396 n. 436, 400-402 (1963).

approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. . . . The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact." (374 U.S. at 306, 308.)

Mr. Justice Brennan also adverted to this in *Schempp:* "There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment." (374 U.S. at 296.)

And, in *Walz,* the opinion spoke in prominent and unmistakable language: "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. . . . The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. . . . The limits of permissible state accommodation to religion are by

no means coextensive with the noninterference mandated by the Free Exercise Clause." (397 U.S. at 668-669, 672; see also 397 U.S. at 676-677.)

D. The essence of the doctrinal development is that nonsecular government action that does not produce sponsorship of religion may favor or accommodate religion if (a) not to do so would violate the Free Exercise Clause, or (b) to do so would either avoid a serious Free Exercise problem or would facilitate religious liberty rather than endanger it by unduly entangling or excessively involving government with religion. It is this last aspect of the doctrinal development of the Establishment Clause that the *Walz* "excessive government entanglement" criterion may most easily be seen as codifying. It represents the Court's most recent effort to amplify its interpretation of the Religion Clauses so as not to construe them "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." (397 U.S. at 671.)

E. As has been shown above, the property tax exemption statute in *Walz* involved nonsecular government action. The Court found that the statute met the above-stated criteria. Although "granting tax exemptions to churches necessarily operates to afford an indirect economic benefit" (397 U.S. at 674), "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." (397 U.S. at 675.) It avoids serious Free Exercise problems because "grants of exemption historically reflect the concern . . . as to the latent dangers inherent in the imposition of property taxes." (397 U.S. at 673.) It helps "guarantee the free exercise of all forms of religious beliefs" (397 U.S. at 678)

and does not produce "excessive government entanglement" because "elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." (397 U.S. at 674.)

F. Some further specific illustrations beyond the statute in *Walz* may be helpful in viewing the *Walz* amplification of Establishment Clause doctrinal development in respect to nonsecular government action—in contrast to statutes with a secular purpose and effect as in *Everson* and *Allen* and the Rhode Island Salary Supplement Act now before the Court.

1. Judicial decisions, holding that the Free Exercise Clause requires special exemption from general civil regulations for persons whose religious beliefs are burdened by the regulations, are examples of nonsecular government action—action that favors or accommodates religion. See, *e.g., Sherbert* v. *Verner,* 374 U.S. 398 (1963). Such action, of course, does not violate the Establishment Clause because of the accommodation between it and the Free Exercise Clause mandated in interpretation of the First Amendment. But, more importantly for purposes of this discussion, in rendering such decisions, the Court has been careful to point out that the nonsecular government action that it is ordering "does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." (374 U.S. at 409.) It is in contexts such as these—*not* in the context of government action that has a secular purpose and effect—that the *Walz* "entanglement" criterion is germane.

2. Government may act to favor or accommodate religion by voluntarily exempting religious persons or institutions from general civil burdens. The statute in *Walz,* as has been shown above, was an example of such nonsecular government action that was held not to violate the Establishment Clause because it did not result in impermissible state involvement or entanglement with religion. See also, *Welsh* v. *United States,* 398 U.S. 333 (1970); *Arlans Dep't Store* v. *Kentucky,* 371 U.S. 218 (1962).

3. Government may engage in nonsecular action to favor or accommodate religion by the enactment of certain affirmative programs. One such program—"off-premises released time"—was held not to violate the Establishment Clause in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), because the Court found "no evidence in the record" (343 U.S. at 311) that the program endangered religious liberty. The state was found only to be "cooperat[ing] with religious authorities" (343 U.S. at 314) and "accommodat[ing] the religious needs of the people." (343 U.S. at 315.) In contrast, several other nonsecular public school programs have been held violative of the Establishment Clause because they did present dangers to religious liberty due to excessive government entanglement and impermissible government involvement with religious instruction and sectarian practices. *McCollum* v. *Board of Education,* 333 U.S. 203 (1948) (on-premises released time); *Engel* v. *Vitale,* 370 U.S. 421 (1962) (Regents' prayer); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) (Bible reading and Lord's Prayer). These latter nonsecular programs involved "the operation of the state's compulsory education system . . . integrated with the program of religious instruction"

(*McCollum,* 333 U.S. at 209); "brought government and religion into that proximity which the Establishment Clause forbids" (Brennan, J., distinguishing *McCollum* from *Zorach* in *Schempp,* 374 U.S. at 263); placed "the power, prestige and financial support of government . . . behind a particular religious belief" (*Engel,* 370 U.S. at 431); "involve[d] the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude" (Goldberg, J., joined by Harlan, J., in *Schempp,* 374 U.S. at 307). The important teaching of the *Walz* criterion is that such effects of nonsecular government action cross the First Amendment line that divides permissible neutrality and accommodation from impermissible sponsorship and entanglement.

4. Government may also engage in nonsecular action to favor and accommodate religion by affording financial benefits. This form of *nonsecular* government action is, of course, highly suspect under the Establishment Clause. Note Mr. Justice Brennan's statement in *Walz:* "General subsidies of *religious* activities would, of course, constitute impermissible state involvement with religion." (397 U.S. at 690; emphasis added.) But, as *Walz* makes clear, in certain instances, even "economic benefit" (397 U.S. at 674) to churches or to religion will not violate the Establishment Clause if not accompanied by "excessive government entanglement." *Sherbert* v. *Verner,* 374 U.S. 398 (1963)—commanding the payment of tax funds in the form of unemployment compensation benefits to a person who would not otherwise receive them except for her religious scruples—further illustrates the proposition that, absent impermissible "involvement of religious with

secular institutions which it is the object of the Establishment Clause to forestall" (374 U.S. at 409), certain limited nonsecular government financial aid to religion may be afforded.

G. It is in *this* context that the *Walz* dictum—that "a direct money subsidy would be a relationship pregnant with involement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards" (397 U.S. at 675)—must be understood. *Walz* was concerned with *nonsecular* financial benefit to religion. "Sustained and detailed administrative relationships" in *this* context would involve and entangle the state with the *religious* activities of churches. Unlike the absence of undue involvement in *Walz* and *Sherbert,* such government action would strike at the core of values underlying the Religion Clauses of the First Amendment. To transpose this *Walz* dictum into the context of a government program that has a *secular* purpose and effect would be "placing too much weight on a few words or phrases of the Court" (397 U.S. at 670); it would be attributing to the Court "too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." (397 U.S. at 668.)

IV.

A. The fact is that a certain quantum of state supervision and control is a constitutional requisite in respect to a secular state program of providing financial assistance to church-related schools. Rather than being a vice, it is a virtue ordinarily commanded by the Establishment Clause to assure that the primary effect of

such a program is the expenditure of public funds for secular—and not religious—education.

If there is any clear principle to be deduced from the course of Establishment Clause adjudication before this Court—one requiring no further citation—it is that public funds may not be used to support religious exercises, religious activities, religious functions, or religious instruction in *any* school—public, private, or church-related. If public funds were granted to church-related schools for the purpose of financing secular education therein and adequate administrative controls did not exist to insure that the public funds were not spent for religious purposes, it would present a real risk that public funds would be used to sponsor religion in violation of the Establishment Clause.

It may well be that Rhode Island's payment of only 15% of the salaries of nonpublic school teachers, who teach only subjects required by state law or actually taught in the public schools, so clearly and presumptively has the secular effect intended by the Salary Supplement Act that no state administrative controls are constitutionally necessary. But it would be high irony, poor public policy and infirm constitutional doctrine to invalidate the Rhode Island statute because the state sought more fully to insure that public funds would not be expended for religious purposes. Indeed, it would be subversive of basic Establishment Clause values for this Court to hold that public funds may be provided for church-related institutions—be they schools, hospitals, or homes for the elderly—only if they are not accompanied by those administrative enforcement mechanisms that secure a secular effect.

B. In invalidating the Rhode Island statute, the court below mentioned an administrative relationship

that it found most troubling—the possibility that state officials would "monitor parochial school expenditures and in close cases determine which spending is 'religious' and which 'secular.' " (396 F. Supp. at 121.) Appellants' Brief (No. 569, pp. 55-58) painstakingly demonstrates that the lower court's concern finds no support in the record in this case. But even if such administrative controls were present, their impact would be to preserve Establishment Clause values rather than undermine them.

If state officials sought to *forbid* certain religious instruction in a church-related school, or *even if* state officials sought to *require* certain secular instruction in a church-related school that conflicted with the religious dictates of the church under whose auspices the school was operated, *then* such administrative requirements might result in an inhibition of religion barred by the First Amendment. But state regulations similar to the lower court's illustration would seek only to assure that public funds are not being used to support religious instruction. They would in no way require that anything be taught or not be taught. They would only determine what may or may not be underwritten with public money.[4] Such state involvement—in no

[4] Under the lower court's illustration, a state official might determine that a particular course in a church-related school does not qualify as secular eduction for purposes of the Salary Supplement Act. It should be noted that such an inquiry by public officials (or courts) is addressed to what is or is not "secular". It in no way involves civil officials (or courts) in "controversies over *religious* doctrine and practice" or requires them "to resolve *ecclesiastical* questions" contrary to this Court's decision in *Presbyterian Church* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440 (1969) (emphasis added). It "does not entail judicial [or administrative] inquiry into dogma or belief." (Harlan, J., concurring in *Walz*, 397 U.S. at 698 n. 1.) It requires a civil determination for *state* purposes, *not* a civil intervention into church matters with ecclesiastical consequences.

way interfering with religious liberty but insuring a primary effect of public funding that does not advance religion—should not be held to invalidate a state program of financial assistance to church-related schools that has a secular purpose and that also both facilitates the religious exercise of those whose conscience calls for attendance at such schools and advances pluralistic values in our society.

C. 1. This Court has explicitly affirmed the constitutional relevance, legitimacy and necessity of such administrative and judicial oversight when public financial assistance is given to church-related schools. In *Allen*, the Court upheld the state's lending of secular textbooks to parochial school students *because* "each book loaned must be approved by the public school authorities; only secular books may receive approval. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." (392 U.S. at 244-245.) The Court clearly invited proof as to whether the state-provided textbooks were "used by the parochial schools to teach religion" and refused to invalidate the state program *because* "no evidence has been offered about particular schools, particular courses, particular teachers, or particular books." (392 U.S. at 248.) Surely a state's effort to insure a primary secular effect does not call for invalidation of the state's secular program.

2. Wholly apart from a program of state financial assistance to church-related schools, this Court has specifically approved of administrative regulation—with judicial review—of church-related schools, attendance at which satisfies the state's compulsory education requirements. When a state so accredits a nonpublic

school, private or church-related—as it must under *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925)—it is obliged to render certain that the accredited nonpublic school "meets the secular educational requirements" (*Everson,* 330 U.S. at 18); "if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function." (*Allen,* 392 U.S. at 247.) Indeed, it might well be that for the state to place its imprimatur on church-related schools through accreditation without insuring that basic state secular educational requirements are fulfilled would itself be a violation of the Establishment Clause.

Pierce acknowledged state authority "reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." (268 U.S. at 534.) *Allen* "confirmed the power of the States to insist" that such schools "provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." (392 U.S. at 245-246.) *Allen* further noted the "*wide range* of private school regulation" and observed approvingly that New York "regulates private schools *extensively,* especially as to attendance and *curriculum*" and requires "that the instruction given in private schools satisfying the compulsory attedance law be 'at least *substantially equivalent* to the instruction . . .'" in public schools. (392 U.S. at 246 n. 7; emphasis added.) Materials presently before this Court further illustrate the broad range of state regulation requiring state

evaluation and approval of nonpublic schools in Rhode Island (Appellants' Brief, No. 569, pp. 58-59 and Appendix) and in Pennsylvania (Brief for Appellee Schools in *Lemon* v. *Kurtzman*, No. 89, October Term, 1970, Supplement C) that has long predated any state financial assistance to them.

The fact is that the state administrative inquiries required pursuant to these accreditation regulations are the *identical* type of administrative inquiries that would be made—and that the Court in *Allen* has urged *should be* made—to assure that public funds are not used to sponsor religious instruction in church-related schools. Such state involvements with church-related institutions inevitably arise whenever religious organizations undertake secular programs—with or without public funds—parallel to those carried on by government. When church-related bodies perform these secular functions, the state has a vital interest in seeing to it that they are carried on within the state's view of proper limits. This is clearly not the "excessive government entanglement" proscribed by *Walz*.[5]

[5] The court below, in dealing with the *Walz* "entanglement" criterion, injected an additional consideration into this case as a basis for invalidating the Rhode Island statute. It believed that "efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy." (316 F.Supp. at 120.) But the *Walz* "excessive government entanglement" statement was clearly not addressed to matters of this kind. *Walz* spoke to impermissible "official and continuing surveillance" of religious matters by government, *i.e.*, of state interference with religion. It did not speak disparagingly of religious groups speaking out and exerting influence in respect to government matters. To the contrary, *Walz* spoke of the "right" of "adherents of particular faiths and individual churches . . . [to] take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions." (397 U.S. at 670.) *Walz* implicitly recognized that to permit tax exemptions for re-

3. This Court has also explicitly recognized the unavoidable administrative and judicial obligation, in areas of Establishment Clause concern, to distinguish between what is secular and what is religious—thus dispelling the lower court's discomfort with "the possibility of legal disputes over the 'secular-religious' distinction." (316 F. Supp. at 121.) In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Court found that a state requirement that public officeholders declare a belief in God had a religious, rather than secular, purpose and effect. In *McGowan* v. *Maryland*, the Court expressed its duty to engage in "close scrutiny" to determine if an activity's purpose and "its operative effect" were religious. (366 U.S. at 449, 453.) In *Engel* v. *Vitale*, the Court found that "daily classroom invocation of . . . the Regents' prayer is a religious activity."

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ligious organizations—as well as any other exemptions for religious interests from general civil regulations—might excite political controversy through the effort to actually obtain them.

Permitting public funds to be used for church-related schools might well produce similar results. But this would be no less true in permitting any government assistance to any of the many secular and social welfare functions of religious institutions. Furthermore, a prohibition of public funds to church-related schools would not likely diminish the extent of religious political activity. Those who send their children to church-related schools might intensify opposition to increased government aid to *public* education on the ground that it raises their taxes without direct personal benefit, decreases their financial ability to support the church-related schools, and augments the operational costs of those schools seeking to maintain qualitative parity with the improved public schools. And if the private cost of attendance at church-related schools became prohibitive, religious pressures might be brought to bear on public school authorities to fashion the operation of public schools in a way more congenial to religious precepts. The fact of religious interests advocating their views in respect to political affairs exists; permitting or denying public financial assistance to parallel secular programs carried on by religious institutions neither exacerbates nor diminishes these political efforts.

(370 U.S. at 424.) In that case, the Court also passed judgment on such public school activities as recitation of the Declaration of Independence (or the Gettysburg Address) and the singing of the Star Spangled Banner—all of which have some religious references—and concluded that these exercises were "patriotic or ceremonial" rather than "religious." (370 U.S. at 435 n. 21.) In *Abington School District* v. *Schempp,* the Court affirmed the trial court's finding that Bible reading and recitation of the Lord's Prayer were religious exercises and had no secular purpose (374 U.S. at 222), while stating that study of the Bible and religion "as part of a secular program of education" was permissible. (374 U.S. at 225.)[6] Thus, the courts must and do stand ready to invalidate any public school practice whose purpose and effect is religious rather than secular. Again, this inquiry is *identical* to that made for the purpose of assuring that public funds are not used to sponsor church-related school practices whose purpose and effect is religious rather than secular.

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[6] It should once more be noted that these inquiries are not of the nature proscribed by this Court in the *Presbyterian Church* case. See fn. 4 *supra.*

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, ET AL., *Appellants,*

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, ET AL., *Appellees.*

No. 569

JOHN R. EARLEY, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

MEMORANDUM IN OPPOSITION TO MOTIONS BY THE CENTER FOR LAW AND EDUCATION, ET AL., AND THE CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL., TO FILE BRIEFS AMICI CURIAE

Motions for leave to file briefs *amici curiae* in these cases have been submitted by two different sets of organizations and individuals—The Center for Law and Education, *et al.*, and the Connecticut State Conference of Branches of the NAACP, *et al.*[1] The appel-

[1] The brief submitted by the Center for Law and Education, *et al.* is addressed to Nos. 569 and 570, and not to No. 153. The brief submitted by the Connecticut State Conference of Branches of the NAACP, *et al.* is addressed to No. 153, as well as Nos. 569 and 570.

lants submit this Memorandum in Opposition to those motions on the sole ground that the briefs attached to both motions seek to inject into this case an issue of racial discrimination which was not presented in the pleadings, not reflected in any of the evidence presented in the trial courts and not considered by the District Courts in their dispositions of the cases.[2] Both briefs seek to attach indiscriminately the stigma of racially discriminatory practices to religiously affiliated schools which benefit from the educational assistance programs which are at issue in these cases. And both briefs urge the existence of those allegedly discriminatory practices as a basis upon which this Court should decide the appeals in these cases.

In effect, the movants are asking this Court to issue an advisory opinion on a set of hypothetical and highly speculative facts. Whether religiously affiliated schools should be constitutionally condemned for alleged racial imbalance in their student bodies presents serious and difficult questions of constitutional law. This Court has expressed extreme reluctance to deciding "important and difficult constitutional issues . . . devoid of factual context." *W. E. DuBois Clubs* v. *Clark,* 389 U.S. 309, 312 (1968). Because the so-called Equal Protection claims the movants wish to argue were not raised in the pleadings in the cases or illuminated by the evidence presented at the trials, the movants are inviting the Court to engage in constitutional adjudication in a context wholly inappropriate to such an exercise of judicial power.

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[2] The attorneys who have signed the brief on behalf of the Connecticut State Conference of Branches of the NAACP, *et al.* are acutely aware that no issue of racial discrimination exists in *Tilton* v. *Richardson,* No. 153, since they are attorneys of record for the plaintiffs in that action and they participated fully in the pre-trial discovery and the trial of that case.

Rule 40(5) requires that briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter." That Rule also provides that "[b]riefs not complying with this paragraph may be disregarded and stricken by the court." The blanket charges of racial discrimination levied by the movants at all religiously affiliated schools quite clearly constitutes "scandalous matter." The effort of the movants to inject the racial discrimination issue into the cases at the present stage of their proceedings constitutes "irrelevant" and "immaterial" matter. The provisions of Rule 40(5) could properly be invoked by this Court to strike their briefs if their briefs were now properly before the Court. The principle embodied in that Rule should be invoked by the Court to deny the motion for leave to file briefs *amici curiae* by the Center for Law and Education, *et al.*, and the Connecticut State Conference of Branches of the NAACP, *et al.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1970

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No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMISKEY, and CORNELIUS A. CUMMISKEY,

Appellants,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island,

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v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

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On Appeal from a Three-Judge United States District Court for the District of Rhode Island

MOTION FOR LEAVE TO FILE A JOINT BRIEF AS *AMICI CURIAE* ON BEHALF OF THE AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

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Supreme Court of the United States

October Term, 1970

No. 569

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The undersigned, as counsel for the American Jewish Committee, the American Jewish Congress and the Anti-Defamation League of B'nai B'rith move this Court for leave to file a joint brief as *amici curiae* in both the above-entitled cases.

Each of these organizations is concerned with the preservation of the security and constitutional rights of Jews in America through the preservation of the security and constitutional rights of all Americans. They are deeply committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the American community generally. They submit this brief because they believe that the program of aid to nonpublic schools, including parochial schools, by means of payment of part of the salaries of teachers teaching in those schools as authorized in the statute under review is a form of aid to religious institutions from public funds, bringing in its train the very evils which the constitutional guarantee of separation of church and state was designed to prevent.

These organizations have consistently fought against any program which might involve diversion of public funds from our free public school system open to all to church-affiliated schools which have as a major goal the advancement of the religious beliefs of the sponsoring groups. They have also opposed use of public funds in aid of sectarian religious schools on the ground that such use of public funds would involve, as an inevitable concomitant, inequality of aid to the schools of the different religious sects and even to private schools, a violation of the guar-

antee of equality of treatment which is a minimum requirement of the religious clauses of the First Amendment which bar aid to one religion or preference of one religion over another. They also believe that another inevitable concomitant of allocation of public funds to religious schools is excessive government entanglement with religion which the Establishment Clause of the First Amendment prohibits. Finally, they believe that there will be no presentation in any of the other briefs of the arguments contained in this brief amicus directed primarily to the impact on minority religious groups of a system of state aid to parochial schools.

The attorney for the Appellees in these cases has consented to the filing of a brief *amicus curiae* by the organizations in whose behalf the attached brief amicus is offered. Attorney General Richard J. Israel of the State of Rhode Island & Providence Plantations has consented for the Appellants in the case of *Robinson* v. *DiCenso*. Mr. Edward Bennett Williams, attorney for the Appellants in *Earley* v. *DiCenso*, No. 569 had indicated that he cannot consent to the filing of a brief amicus by the sponsors of the brief so long as the American Jewish Congress is one of the participating organizations. He also stated that if the organizations sponsoring this motion should decide to seek permission to file the brief by a motion filed with the Supreme Court, he would not object to or oppose that motion on behalf of the Appellants in No. 569.

Because of our desire to comply with the practice of filing briefs amicus at a date no later than the date of required filing of the brief of the party in whose support the

brief amicus is submitted, we are attaching our brief amicus to this motion.

Respectfully submitted,

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Dated: February 1, 1971

IN THE

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No. 569

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BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

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IN THE

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BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Statement of the Case

This proceeding was started in the U. S. District Court for the District of Rhode Island by a complaint challenging the constitutionality of the Salary Supplement Act adopted by Rhode Island, effective July 1, 1969, R.I. Gen. Laws, Chap. 1651. The statute provides for underwriting by the state of up to 15% of the salaries of those persons teaching grades 1-8 in church-related and other private schools who are teaching subjects required by state law to be taught in public schools or other subjects taught in public schools, and using materials used in the public schools.

The three-judge court which was duly convened held unanimously that the state violated the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment. This appeal followed.

The Questions to Which This Brief Is Addressed

This brief is addressed to two questions. One is whether the Rhode Island statute under consideration in this litigation, which provides for the payment of part of the salaries of teachers in sectarian religious institutions, violates the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment. The

second question to which this brief is directed is whether the State of Rhode Island, by adopting a statute providing for payment of state funds to be used to pay teachers' salaries in sectarian religious schools has violated the prohibition against state discrimination among religions embedded in the First Amendment.

Summary of the Argument

The Rhode Island statute here under consideration violates the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment, because it provides for the use of state funds to pay a portion of the teacher salary costs of religious institutions, an essential part of the educational operations of such institutions. As the statute in question makes clear, the purpose of such aid is to make it possible for the nonpublic schools of the state, including sectarian religious schools, to continue to operate as schools. Such state financing of the educational operations of a sectarian religious school cannot be justified under the child benefit theory since even that theory does not authorize the use of state funds in aid of a sectarian religious institution, whether educational or not. Furthermore, the purpose and primary effect of the statute in question is clearly to allocate state funds to help keep alive a system of sectarian religious schools, necessarily an aid to the religious institutions which maintain those schools and to their religious purposes. In addition the financing of some of the costs of church-affiliated schools will necessarily result in an excessive government entanglement with religion which the Establishment Clause of the First Amendment prohibits.

The statute in question has still another vital constitutional defect since, by providing for state support of institutions which discriminate in admissions and in their operations on the basis of religion, it violates the prohibition against discrimination among religions, the ban on aid to one religion or preference of one religion over another embedded in the religious clauses of the First Amendment. Unless the religious schools in question cease to be religious schools, cease to give preference in admissions and in their practices to children adhering to the sect which operates the schools, the effect of such aid would necessarily be to facilitate discrimination among those receiving assistance from such aid on the basis of religion and, where there is a relationship between religion and race, race also.

Argument

The undersigned organizations all joined in a brief *amicus curiae* in one of the cases to be argued together with the instant case (*Lemon* v. *Kurtzman*, No. 89), which raises much the same issues as are here involved. We therefore refrain from repeating the arguments there made. This brief is confined to a short statement of the reasons why we believe that the arguments made in the other brief apply to this case (Point One) and our argument that the Rhode Island statute, by financing institutions that discriminate on the basis of religion, violates the concept of equality embedded in the Establishment Clause. (Point Two.)

POINT ONE

The statute, in operation, violates the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth.

The issue in this case is simple. A state statute finances in part one of the necessary expenses—teachers' salaries—of educational institutions that are established by religious institutions and foster religious tenets. On its face, this arrangement clearly violates the oft-repeated statement by this Court in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947), that the Establishment Clause of the First Amendment means at least that

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

That statement was reaffirmed most recently by this Court in *Board of Education* v. *Allen*, 392 U. S. 236, 242 (1968).

The court below declared that this statement "cannot be applied in such a literal manner" as to bar appropriation of tax monies for employees of religious institutions (App. 38). We submit, however, that there is no authority for the view that the quoted sentence means anything less than what it says.

The court below suggested that the decisions in *Everson* and *Allen* show that some forms of support are permissible (App. 38). In the *Everson* case, however, where this Court

upheld use of state funds to provide transportation for children attending parochial schools on the ground that transportation was for the physical welfare of the child rather than an educational benefit, it went on to say that the arrangement there approved "approaches the verge" of the state's power to legislate for the general welfare (330 U. S. at 16). Here there is no question that the subsidy given pays for an aspect of the educational operations of religious institutions without which they could not exist as a school. If bus transportation approaches the "verge" of what is permissible, financing of a school's educational operations plainly violates the prohibition.

In *Allen,* this Court based its decision on its conclusion that no aid was given "to parochial schools, and the financial benefit is to parents and children, not to schools" (292 U. S. at 243-4). Here, the stated purpose of the statute is to benefit the nonpublic schools. The legislative findings contained in Section 1 of the statute make it clear that it was explicitly designed to make it possible for the nonpublic schools of the state to continue their operations.

Even if the legislative findings were not in Section 1 of the statute, it is respectfully submitted that the conclusion in *Allen* upholding the aid there given on the ground that it was given for the financial benefit of parents and children is invalid. The argument that aid given to the children is not aid to the school and therefore does not violate the prohibition of the First Amendment against public aid to sectarian institutions, if interpreted to sustain the granting of educational aids to sectarian organizations, makes the constitutional ban on such aid meaningless.

This theory, the "child benefit theory," was advanced originally by those defending the constitutionality of an Oregon state law providing free textbooks at state expense to children attending parochial schools. This statute was invalidated by the Oregon Supreme Court under the Oregon State Constitution. *Dickman* v. *School District,* 232 Ore. 238 (1961), cert. den. 371 U. S. 823.

The Court's opinion in that case noted that the difficulty with the "child benefit theory" was that "unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are a benefit to the pupil" (p. 250). It was a realization by the Oregon Supreme Court that, under the "child benefit theory," the state could provide religious texts to sectarian schools on the ground that a child who attends such a school is benefited by receiving a religious education that led the Court to reject the theory.

It is clear from the foregoing that even the most wholehearted supporters of the child benefit theory must agree that a line must be drawn somewhere between the aid which the state may grant to children in sectarian religious schools and aid which it may not give because of the prohibition against the use of public funds in aid of sectarian education.

This proposition was succinctly stated by Rhode Island Superior Court Judge Fred B. Perkins in *Bowerman* v. *O'Connor* (Superior Ct., Providence, R.I., Sept. 19, 1967, Equity #31775), when he said, "Indeed what could be more in the nature of a 'child benefit' * * * than furnishing funds toward the construction of the school building itself? Yet this has never been countenanced for religious schools.

The Court is persuaded that the line must in any case be drawn at the entrance to the school." (p. 31)

In *Everson,* as has been noted above, this Court drew such a line. It stressed that transporting children to and from school at state expense, which it was upholding, is "separate and * * * indisputably marked off from the religious function" of the school (p. 18). When it went on to make it clear that the bus transportation aid it was upholding approached the verge of the state's constitutional power under the First Amendment, it was indicating that assistance to children attending parochial schools more closely related to the religious function of the schools (which cannot be disassociated from its education function) would clearly pass over the borderline separating lawful assistance given to children attending all schools to preserve their health and safety from unconstitutional assistance given to the educational functions of the sectarian religious school.

Obviously, the use of public funds to pay part of the teaching costs of a parochial school is an integral part of the educational function and process in such schools. It can hardly be argued that such assistance is provided to preserve the health, safety and physical welfare of the pupils. And it is clear that such payments serve the religious objectives of the school since they shift from the shoulders of the religious institution maintaining the school to the shoulders of the state an important part of the cost of carrying out the educational functions of the school.

Even if we ignore what this Court said in *Everson* and the necessary limits of the "child benefit theory" and con-

sider only "the purpose and the primary effect of the enactment" (*Abington School District* v. *Schempp,* 374 U. S. 203, 222 (1963)), the result is the same, as the court below held. Whether we consider purpose or primary effect, the Rhode Island statute falls under the *Schempp* test. It would be strange indeed if a statute which was enacted in order to keep alive a system of nonpublic church-affiliated schools were held to be exclusively secular in either purpose or primary effect.

The record in this case leaves no doubt that the schools aided by the Rhode Island program are part of a religious institution, the Catholic Church. Regardless of the nature of the instruction given by the teachers involved in the program, the schools are still instruments for the propagation of religion. There is no suggestion that the nature, amount or intensity of that aspect of the schools' curricula has been changed. A statute that is designed to, and does, enable such schools to operate, we submit, is religious in purpose and effect.

Finally, the financing of church-affiliated schools under the Rhode Island statute results in "an excessive government entanglement with religion" which this Court has said the Establishment Clause prohibits. *Walz* v. *Tax Commission,* 397 U. S. 664, 674 (1970). The fact that the monetary transactions take place between the state and the teachers rather than between the state and the school does not significantly reduce the amount of entanglement. The arrangement is equivalent, for all practical purposes, to "a direct money subsidy." What the teacher receives from the state because he is a teacher in the religious

school is money the school need not pay him. And he receives it only so long as he is kept as a teacher by the school. Thus it results in "a relationship pregnant with involvement" which encompasses "sustained and detailed administrative relationships for enforcement of statutory and administrative standards" (397 U. S. at 675). The subsidies, as Justice Harlan points out in his concurring opinion in *Walz,* "must be passed on periodically and thus invite * * * political controversy * * *" (397 U. S. at 699).

Both of the evils that arise out of subsidies of religious institutions—political controversy over appropriations and government involvement in administration—are present here. The record in this case makes it clear that it would be the church and the church schools that would be the suppliants at the legislature's door for each appropriation (App. 59-67, 87-88). In view of its position that the amount of aid given in 1969 was "quite small" (App. 67), it may be assumed that the Church will be directly involved in "political controversy" as to the extent and form of aid to be given, each time the legislature meets. It would not be the teachers with whom the legislature and public officials would be dealing but the schools and the religious institutions that maintain them.

With respect to administrative involvement, appellants urge that the state's principal dealings under the statute are with the teachers. Thus, the appellants in No. 569 state that "The principal administrative relationships created by the Act are between the State officials and individual teachers, and the involvement between government and religious institutions is, at most, minimal" (Brief, p. 15).

Examination of the statute refutes the statement. Section 16-51-2, subdivision 1, limits application of the statute to nonpublic schools on the basis of their annual expenditures. Manifestly this requires examination by the state of the school's records. Subdivision 2 of that section limits payment to teachers on the basis of what they teach in the school, again requiring examination of the school by the state. Similar requirements appear in paragraphs 1 and 4 of Section 16-51-3. Section 16-51-5 requires the state to audit financial records of the nonpublic schools to insure that the teacher is receiving a specified minimum salary. The same section requires that the school "comply with the provisions contained in title VI of the civil rights act of 1964." We discuss this provision further below, but we point out here that it manifestly requires supervision by the state of both the admission practices and the employment practices of the affected schools. This conclusion is reinforced by the regulations adopted by the Rhode Island Commission of Education under the statute which require *inter alia*, a number of reports by the schools, but not by the teachers, on the nature of their operations (App. 173-174).

We submit that the financial aid given under the Rhode Island statute to schools operated by religious institutions is in plain violation of the Establishment Clause of the First Amendment.

POINT TWO

The statute, by providing for state support of institutions which discriminate on the basis of religion, violates the prohibition against discrimination among religions embedded in the First Amendment.

Circuit Judge Hastie, dissenting in *Lemon* v. *Kurtzman*, 310 F.Supp. 35, 52 (E.D. Pa., 1969), now before this Court on appeal (No. 89, 1970 Term), said:

> * * * In schools with such a [religious] mission it is appropriate, practically unavoidable, that admission policies and practices reflect a preference for enrollment of children of the sponsoring faith, though not necessarily excluding all others. Yet, once the state joins in financing such education, the mandated equalitarian position of the state must result in state imposition of strictly non-discriminatory admission standards consistent with public duty, whatever sacrifice of appropriate religious objectives may result.

We submit that the equalitarian mandate referred to by Judge Hastie renders the scheme of the Rhode Island statute unconstitutional.

It is well settled that the Equal Protection Clause of the Fourteenth Amendment applies to all operations that constitute action by the state. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). It has been repeatedly held that institutions whose operations are subsidized in part by the state must meet the required constitutional standard of equal protection. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *Kerr* v. *Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir., 1945), cert. den. 326 U. S. 721 (1945).

If the schools benefiting under the Rhode Island statute were to discriminate in admissions on the basis of race, there would be a clear violation of the requirements of the Equal Protection Clause. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Oklahoma,* 332 U. S. 631 (1948); *Kerr, supra*; *Hirabayashi* v. *United States,* 320 U. S. 81 (1943). The constitutional mandate of equality applies with the same force, we submit, to state action that discriminates on the basis of religion.

Thus, in *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100 (1947), this Court said

> Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power. * * *

In *Niemotko* v. *Maryland,* 340 U. S. 268 (1951), this Court found that use of a public park, normally open to religious groups, had been discriminatorily denied to a particular religious group although other religious activities had been allowed. It concluded that "the completely arbitrary and discriminatory refusal to grant the permit was a denial of equal protection" (at 273).

It is true that the complaint herein does not allege that the challenged statute denies equal protection of the law in violation of the Fourteenth Amendment. However, the concept of equal protection is not confined to that amendment. It is embedded likewise in the Establishment Clause

of the First Amendment which, this Court has held, prohibits state action discriminating among religious groups. Thus, this Court said in the *Everson* case, 330 U. S. at 15, that, under the Establishment Clause, "Neither a state nor the Federal Government can * * * pass laws which aid one religion, aid all religions, or prefer one religion over another." The Court went on to say (at 16):

> [The State] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

The condemnation of discrimination among religions in the *Niemotko* case was rested on freedom of religion as well as equal protection concepts (340 U. S. at 272). This double basis is even clearer in *Fowler* v. *Rhode Island*, 345 U. S. 367 (1953), which reached the same result on similar facts. Indeed, in that case, this Court emphasized the guarantees of the First Amendment as made applicable to the states by the Fourteenth. This caused Justice Frankfurter to note that he concurred in the opinion of the Court except to the extent that it relied upon the First Amendment. He said that, for him, "it is the Equal-Protection-of-the Laws Clause of the Fourteenth Amendment that condemns the Pawtucket ordinance as applied in this case" (at 70).

It would be contrary to the public policy manifested in many recent Federal and state statutes to bar discrimination based on race and allow discrimination based on religion. Thus, the prohibition of discrimination in places of public accommodation and employment in Titles II and VII

respectively of the Civil Rights Act of 1964 (42 U.S.C. Secs. 2000a to 2000a-6 and Secs. 2000e to 2000e-15) and the prohibition of discrimination in housing in Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Secs. 3601 to 3619) all apply to discrimination based on race, religion and national origin. Virtually all of the antidiscrimination laws enacted in the past 25 years in the various states have used the same formula.

Here, however, we have a statutory scheme which permits institutions receiving state support to discriminate on the basis of religion but not on the basis of race. The statute provides in Section 16-51-5 that the regulations issued thereunder shall insure that any affected nonpublic school employing teachers who receive salary supplements under the statute "shall comply with the provisions contained in title VI of the civil rights act of 1964" and, accordingly, the regulations require the principal in each school having teachers who apply for aid to certify that the school complies with Title VI (App. 174). That Title (42 U.S.C. Secs. 2000d to 2000d-4) prohibits institutions receiving any form of aid from the Federal Government from discriminating "on the ground of race, color, or national origin" (42 U.S.C. Sec. 2000d). Thus, the Rhode Island statute* and regulations leave the af-

* Other Rhode Island statutes do not apply. There is no ban on discrimination in admissions by nonpublic schools and the state fair employment law (Rhode Island General Laws, Sec. #28-5-1 to 28-5-39) exempts religious, educational and nonsectarian institutions (Sec. 28-5-6, par. (B)).

The question might also be raised whether a provision which would bar sectarian schools which do discriminate on the basis of religion in admissions or in their educational practices from receiving the aid given by the statute would not put the State of Rhode Island in the position of denying religious freedom guaranteed under the First Amendment to such institutions.

fected schools free to discriminate on the basis of religion.*

The record in this case does not reveal the admissions policies of the parochial schools affected by the statute, other than a suggestion in the Diocesan Handbook of School Regulations that preference should be given to "a child whose parents support the parish" (App. 223). There is testimony that "substantially most" of the children at the schools are Roman Catholics (App. 73). It may be assumed that in none of these schools is admission formally restricted to children of Catholic parents. It is clear, however, that it is restricted to children of parents who are prepared to have their children receive instruction in the Catholic faith and participate in Catholic religious observances. This follows from the fact that religious instruction is a part of the curriculum of the parochial schools in the Diocese for all children in the schools (App. 78-81, 104), the fact that daily prayers are recited in all classes (App. 77, 79-80, 105), and the fact that all children attend assemblies which include religious programs (App. 83-84, 85). The principal at one school testified, "I do not believe we have any non-Catholics at the schools" (App. 106).

Restriction of admission to those who are prepared to conform to the practices of a particular religion and accept instruction in its tenets is discrimination on the basis of religion. Both the Equal Protection Clause and the Estab-

* Appellants in No. 569, in referring to Title VI (Brief, p. 54, n. 54), cite 42 U.S.C. Sec. 2000e, rather than 2000d. Sections 2000e to 2000e-15 embody Title VII of the 1964 Act, not Title VI. Title VII prohibits discrimination in employment on the basis of religion as well as race and national origin. It should be noted also that Title VI covers admission practices as well as employment.

lishment Clause would prohibit such a restriction in any public institution. We submit that the prohibition applies also to institutions that accept government financing of vital aspects of their operations.

The foregoing makes clear another aspect of violations of the prohibition against discrimination which would flow from the use of public funds to pay portions of the costs of operation of sectarian religious schools. Clearly such schools, in the exercise of their function of strengthening religious indoctrination and educating their pupils in the need to accept and believe in the religious precepts which gave rise to the creation of such schools, could give preference in admission to children of that faith. And as does happen where some religious faith groups consist largely of members of one racial group or where the religious dogmas adhered to by that religious group reflect a relationship between religion and race, as for example is the case with Mormons and certain non-evangelical religious groups, the effect of aid to such religious schools would necessarily be to facilitate discrimination on the basis of race in access to the state aid given to such a school even though the school's purpose is that of giving preference to adherents to the particular religious group which operates the school. This might not only offend against the First Amendment ban on preference to any religion but also against the Fourteenth Amendment ban on denial of equal protection of the laws.

Conclusion

We respectfully submit that, for the reasons stated above, the decision of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

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REPLY BRIEF

In view of the heavy volume of written material now before the Court in these cases, the appellants submit this reply brief with some reluctance. However, two aspects of the argument developed by the appellees in their brief compel a written response. The first is the appellees' scurrilous effort to inject

the issue of racial discrimination into these cases at this late date. The second is the method by which the appellees attempt to overcome their failure to prove at trial that religion permeates those phases of secular instruction in parochial schools that are aided by public funds. This reply brief will be strictly limited to those two issues.

I.

The Issue of Racial Discrimination

In their brief submitted to this Court, the appellees suggest for the first time in this litigation that the Salary Supplement Act should be struck down under the Equal Protection Clause of the Fourteenth Amendment. The basis for that claim is as amorphous as the claim itself. The appellees seem to be arguing that the mere fact that fewer blacks attend religiously affiliated schools than attend public schools is a sufficient ground for invalidating educational assistance programs that benefit, *inter alia,* religiously affiliated schools. But the innuendos of appellees' argument sweep far more broadly and invidiously. The appellees accuse parents who choose to send their children to religiously affiliated schools* of being motivated in that choice by bigotry and racial bias. And the appellees suggest that religiously affiliated schools are willing partners with parents in the efforts to avoid the consequences of racial integration of the public schools. Such an unfounded attack on parents and religiously affiliated schools deserves condemnation, rather than consideration, by this Court.

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* Parents have a constitutional right to choose private schools rather than public schools for the education of their children. *Pierce* v. *Society of Sisters,* 285 U.S. 510 (1925).

If the appellees' Equal Protection arguments were properly before the Court, they would present the Court with difficult factual and constitutional problems. Surely the appellees' haphazard and highly selective collection of statistics and "facts" are woefully inadequate to illuminate the constitutional implications of the appellees' supposed legal argument. For example, the issue in these cases is whether the Rhode Island General Assembly exceeded constitutional limitations on its power by enacting the Salary Supplement Act. The appellees would have this Court invalidate that statute under the Equal Protection Clause. Yet their brief contains no information concerning the racial composition of either public or nonpublic schools in Rhode Island. How then is the Court to apply the appellees' proposed Equal Protection doctrine to the facts of these cases? This Court has consistently displayed a reluctance to decide "important and difficult constitutional issues . . . devoid of factual context." *W.E. DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1968); cf. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). These cases are totally devoid of any facts developed through the adversary process to illuminate the Equal Protection arguments that the appellees have now injected.

However, the Court need not concern itself with how it might decide such an Equal Protection claim if it were properly before the Court. For such a claim is not properly before the Court in these cases. The appellees concede that "[w]e did not raise the Equal Protection claim in the present case but relied exclusively on the First Amendment." Appellees' Brief, p. 53. That is perhaps the only credible assertion made by the appellees in the course of their Equal

Protection argument. The Equal Protection claim was not pleaded in their complaint. No evidence was presented during the trial bearing on such a claim. And the trial court did not take account of any such claim by the appellees in its opinion. If this Court were to decide this case on the Equal Protection grounds urged by the appellees, it would be issuing an advisory opinion and would thereby exceed the power conferred by Article III of the Constitution.

The attorneys for the appellees cannot complain of an oversight in failing to raise the Equal Protection claim at an earlier stage of these cases. One of the appellees' attorneys—Mr. Leo Pfeffer—signed the complaints filed in *Lemon* v. *Kurtzman,* No. 89, 1970 Term, and *Johnson* v. *Sanders,* Civ. Action No. 13,432 (D. Conn., decided Nov. 20, 1970). Both of those complaints pleaded an Equal Protection claim similar to that now being argued by the appellees, and both of those complaints were filed before the complaint in these cases. Consequently, the appellees' failure to raise their Equal Protection arguments at an earlier stage of this case must be viewed as deliberate, and they should be barred from any consideration of those arguments by this Court.

This Court's Rules provide a mechanism for dealing with litigants such as the appellees who submit burdensome and irrelevant matter. Rule 40(5) requires that briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter." It further provides that "[b]riefs not complying with this paragraph may be disregarded and stricken by the court." The pages that appellees' brief devotes to their Equal Protection argument clearly constitute "irrelevant" and "immaterial" matter. And appellees' effort to

attach the stigma of racially discriminatory policies to all religiously affiliated schools is "scandalous" by any definition of that word. The appellants respectfully suggest that the Court consider invoking the sanctions of Rule 40(5) against the appellees for their attempt to inject unfounded allegations of racial discrimination into these cases at the present stage of their proceedings.

II.

The Permeation Issue

The appellees construct their permeation argument on a single document—the Handbook of School Regulations of the Diocese of Providence. The appellees choose to ignore the critical fact that teachers who appeared at trial testified that the Handbook had no force or effect on how they taught their secular courses. See Appellants' Brief, No. 569, pp. 73-74. The appellees also carefully and deliberately avoid any reference to the trial testimony which convincingly refutes any contention that teachers receiving salary supplements are permeating their secular courses with religion, and the specific findings of non-permeation entered by the trial court. J.A. 35-37. The appellees' feeble efforts to weave a permeation argument are, of course, a concession that, under *Board of Education* v. *Allen*, 392 U.S. 236 (1968), they must carry the burden of proof on the permeation question if they are to prevail. But any fair reading of the total evidence presented on that question demonstrates the failure of the appellees to carry that burden.

The appellees' permeation argument betrays their misunderstanding of the essential issues in this litigation. The appellees appear to assume that the parochial school system in Rhode Island is on trial and

that the permeation question can be resolved by simply examining a few broad policy declarations attributable to that school system. But the State has not undertaken to aid parochial schools generally. The funds appropriated under the Salary Supplement Act go only to those nonpublic school teachers who qualify under the statute's carefully tailored program to aid secular teaching. Not all teachers in Rhode Island parochial schools have qualified or have sought to qualify under the Act. Indeed, there is testimony offered by the appellees showing that teachers in "many parochial schools" have not sought salary supplements. J.A. 150.

Consequently, the permeation issue in this litigation must be resolved by reference to the teaching methods employed by teachers receiving state funds—and not by reference to teaching methods that might be employed in parochial schools generally. The appellees ignore this critical distinction and invite this Court to infer the existence of permeation on the basis of a few isolated sentences in the Handbook of School Regulations. But the teachers who testified at trial said they were unfamiliar with the Handbook, and they all denied unequivocally injecting any religious content into their secular courses. Even the appellees concede that parochial school teachers do not view the Handbook as obligatory in all of its particulars. As a result, it is simply not possible for the Court to infer from a few isolated sentences in the Handbook that parochial school teachers receiving salary supplements engage in permeation when the unchallenged testimony of such teachers refutes any such inference.

The appellees were not without other evidentiary resources in their effort to prove that State funds were

supporting religiously permeated secular teaching. They could have called as their witnesses the more than 250 parochial school teachers who had qualified for salary supplement payments. However, except for taking the depositions of three such teachers, J.A. 158, 231, 242, they avoided that source of potential proof. And the three teachers they deposed denied unequivocally that they engaged in permeation practices. J.A. 103, 241, 252. The appellees also could have confronted those teachers who testified at trial with the Handbook provisions that might appear to be inconsistent with their testimony of non-permeation. But the appellees deliberately avoided such a confrontation. For that reason, the appellees have failed to establish any link between the Handbook provisions they rely on and the actual teaching methods employed by parochial school teachers who have qualified for salary supplement payments.

The appellees seek to buttress their preference for a single document rather than the sworn testimony of teachers by emphasizing that the Handbook has been given the force of "synodal law." Appellees' Brief, p. 24. Then they rather quickly equate "synodal law" with "canon law," *id.* at 24, 25, and label the Handbook itself "canon law." *Id.* at 24. But the appellees' brief contains no explanation of what the force or effect of synodal law is, how synodal law becomes canon law, or how a publication intended for use in elementary schools becomes part of the canon law of the Roman Catholic Church. The reasons for those omissions are obvious. There is no evidence in the record of these cases bearing upon those theological questions, and neither the appellees nor their attorneys have the necessary expertise to enlighten the Court on such theological matters.

The appellees might have laid a proper evidentiary foundation for their theological arguments by presenting expert testimony on those issues at trial. But they offered no such evidence, even though they had an opportunity to do so. The appellees' only witness at trial was Rev. Edward W. K. Mullen, the Superintendent of Schools for the Diocese of Providence. Presumably he could have explained the significance of giving the Handbook the force of synodal law. But the appellees did not seek any such enlightenment from Father Mullen.

This brief is not the appropriate vehicle for engaging in a theological debate with the appellees. But it should be stressed that, absent competent evidence of the meaning and scope of synodal and canon law, the Handbook attains no greater significance by equating its provisions with synodal or canon law.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 89. Argued March 3, 1971—Decided June 28, 1971*

Rhode Island's 1969 Salary Supplement Act provides for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education is below the average in public schools. Eligible teachers must teach only courses offered in the public schools, using only materials used in the public schools, and must agree not to teach courses in religion. A three-judge court found that about 25% of the State's elementary students attended nonpublic schools, about 95% of whom attended Roman Catholic affiliated schools, and that to date about 250 teachers at Roman Catholic schools are the sole beneficiaries under the Act. The court found that the parochial school system was "an integral part of the religious mission of the Catholic Church," and held that the Act fostered "excessive entanglement" between government and religion, thus violating the Establishment Clause. Pennsylvania's Nonpublic Elementary and Secondary Education Act, passed in 1968, authorizes the state Superintendent of Public Instruction to "purchase" certain "secular educational services" from nonpublic schools, directly reimbursing those schools solely for teachers' salaries, textbooks, and instructional materials. Reimbursement is restricted to courses in specific secular subjects, the textbooks and materials must be approved by the Superintendent, and no payment is to be made for any

*Together with No. 569, *Earley et al.* v. *DiCenso et al.*, and No. 570, *Robinson, Commissioner of Education of Rhode Island, et al.* v. *DiCenso et al.*, on appeal from the United States District Court for the District of Rhode Island.

Syllabus

course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Contracts were made with schools which have more than 20% of all the students in the State, most of which were affiliated wtih the Roman Catholic Church. The complaint challenging the constitutionality of the Act alleged that the church-affiliated schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. A three-judge court granted the State's motion to dismiss the complaint for failure to state a claim for relief, finding no violation of the Establishment or Free Exercise Clause. *Held:* Both statutes are unconstitutional under the Religion Clauses of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion. Pp. 7–20.

(a) The entanglement in the Rhode Island program arises because of the religious activity and purpose of the church-affiliated schools, especially with respect to children of impressionable age in the primary grades, and the dangers that a teacher under religious control and discipline poses to the separation of religious from purely secular aspect of elementary education in such schools. These factors require continuing state surveillance to ensure that the statutory restrictions are obeyed and the First Amendment otherwise respected. Furthermore, under the Act the government must inspect school records to determine what part of the expenditures is attributable to secular education as opposed to religious activity, in the event a nonpublic school's expenditures per pupil exceed the comparable figures for public schools. Pp. 10–15.

(b) The entanglement in the Pennsylvania program also arises from the restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular as distinguished from religious education. In addition, the Pennsylvania statute has the further defect of providing continuing financial aid directly to the church-related schools. Historically governmental control and surveillance measures tend to follow cash grant programs, and here the government's post-audit power to inspect the financial records of church-related schools creates an intimate and continuing relationship between church and state. Pp. 15–16.

Syllabus

(c) Political division along religious lines was one of the evils at which the First Amendment aimed, and in these programs, where successive and probably permanent annual appropriations that benefit relatively few religious groups are involved, political fragmentation and divisiveness on religious lines are likely to be intensified. Pp. 16–18.

(d) Unlike the tax exemption for places of religious worship, upheld in *Walz* v. *Tax Commission*, 397 U. S. 664, which was based on a practice of 200 years, these innovative programs have self-perpetuating and self-expanding propensities which provide a warning signal against entanglement between government and religion. Pp. 18–19.

No. 89, 310 F. Supp. 35, reversed and remanded; Nos. 569 and 570, 316 F. Supp. 112, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BLACK, DOUGLAS, HARLAN, STEWART, MARSHALL (as to Nos. 569 and 570), and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BLACK, J., joined, and in which MARSHALL, J. (as to Nos. 569 and 570), joined. BRENNAN, J., filed a concurring opinion. WHITE, J., filed an opinion concurring in the judgment in No. 89 and dissenting in Nos. 569 and 570. MARSHALL, J., took no part in the consideration or decision of No. 89.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, and 570.—October Term, 1970

Alton J. Lemon et al., Appellants, 89 *v.* David H. Kurtzman, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
John R. Earley et al., Appellants, 569 *v.* Joan DiCenso et al. William P. Robinson, Jr., Commissioner of Education of the State of Rhode Island, et al., Appellants, 570 *v.* Joan DiCenso et al.	On Appeal From the United States District Court for the District of Rhode Island.

[June 28, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions as well as other private schools. We hold that both statutes are unconstitutional.

I

The Rhode Island Statute

The Rhode Island Salary Supplement Act[1] was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools during a specified period. Appellant state Commissioner of Education also requires eligible schools

[1] R. I. Gen. Laws c. 16–51.

to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.[2]

The Act also requires that teachers eligible for salary supplement must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

Appellees are citizens and taxpayers of Rhode Island. They brought this suit to declare the Rhode Island Salary Supplement Act unconstitutional and to enjoin its operation on the grounds that it violates the Establishment and Free Exercise Clauses of the First Amendment. Appellants are state officials charged with administration of the Act, teachers eligible for salary supplements under the Act, and parents of children in church-related elementary schools whose teachers would receive state salary assistance.

A three-judge federal court was convened pursuant to 28 U. S. C. §§ 2281, 2284. It found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Cath-

[2] The District Court found only one instance in which this breakdown between religious and secular expenses was necessary. The school in question was not affiliated with the Catholic church. The court found it unlikely that such determinations would be necessary with respect to Catholic schools because their heavy reliance on nuns kept their wage costs substantially below those of the public schools.

olic church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. In addition two judges thought that the Act had the impermissible effect of giving "significant aid to a religious enterprise." 316 F. Supp. 112. We affirm.

The Pennsylvania Statute

Pennsylvania has adopted a program which has some but not all of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act [3] was passed in 1968 in response to a crisis that the Pennsylvania legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education . . . ."

The statute authorizes appellee state Superintendent of Public Instruction to "purchase" specified "secular educational services" from nonpublic schools. Under the

[3] 24 Pa. Stat. Ann. §§ 5601–5609.

"contracts" authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. The funds for this program were originally derived from a new tax on horse and harness racing, but the Act is now financed by a portion of the state tax on cigarettes.

There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "presented in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages,[4] physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The Act went into effect on June 19, 1968, and the first reimbursement payments to schools were made on September 2, 1969. It appears that some $5 million has been expended annually under the Act. The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils—more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.

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[4] Latin, Hebrew, and classical Greek are excluded.

Appellants brought this action in the District Court to challenge the constitutionality of the Pennsylvania statute. The organizational plaintiffs-appellants are associations of persons resident in Pennsylvania declaring belief in the separation of church and state; individual plaintiffs-appellants are citizens and taxpayers of Pennsylvania. Plaintiff Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. In addition, Lemon alleges that he purchased a ticket at a race track and thus had paid the specific tax which supports the expenditures under the Act. Appellees are state officials who have the responsibility for administering the Act. In addition seven church-related schools are defendants-appellees.

A three -judge federal court was convened pursuant to 28 U. S. C. §§ 2281, 2284. The District Court held that Lemon alone had standing to challenge the Act since he alone had paid the tax that financed the statutory scheme. The organizational plaintiffs-appellants were denied standing under *Flast* v. *Cohen,* 382 U. S. 83, 99, 101 (1967).

The court granted Pennsylvania's motion to dismiss the complaint for failure to state a claim for relief.[5] 310 F. Supp. 35. It held that the Act violated neither the Establishment nor the Free Exercise Clauses, Chief Judge Hastie dissenting. We reverse.

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[5] Plaintiffs-appellants also claimed that the Act violated the Equal Protection Clause of the Fourteenth Amendment by providing state assistance to private institutions that discriminated on racial and religious grounds in their admissions and hiring policies. The court unanimously held that no plaintiff had standing to raise this claim because the complaint did not allege that the child of any plaintiff had been denied admission to any nonpublic school on racial or religious grounds. Our decision makes it unnecessary for us to reach this issue.

II

In *Everson* v. *Board of Education*, 330 U. S. 1 (1947), this Court upheld a state statute which reimbursed the parents of parochial school children for bus transportation expenses. There MR. JUSTICE BLACK, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. *Id.*, at 16. Candor compels acknowledgement, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission*, 397 U. S. 664, 668 (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 674.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion. 392 U. S., at 248. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities are religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these pro-

visions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

III

In *Walz* v. *Tax Commission, supra,* the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach* v. *Clauson,* 343 U. S. 306, 312 (1952); *Sherbert* v. *Verner,* 374 U. S. 398, 422 (1963) (HARLAN, J., dissenting). Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz,* the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. MR. JUSTICE HARLAN, concurring in *Walz, supra*, echoed the classic warning as to "programs whose very nature is apt to entangle the state in details of administration . . . ." *Id.*, at 695. Here we find that both statutes foster an impermissible degree of entanglement.

(a) *Rhode Island program*

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religous exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these

schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than permitting some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.[6]

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to

[6] See, *e. g.*, J. Fichter, Parochial Schools: A Sociological Study 77–108 (1958); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513, 574 (1968).

Allen have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense.

In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character than books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the dangers that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. In most cases, each individual parish, however, assumes the ultimate financial responsibility for the school, with the parish priest authorizing the allocation of parish funds. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969 lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their

number is growing. They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest, and he retains some discretion in negotiating salary levels. Religious authority necessarily pervades the school system.

The schools are governed by the standards set forth in a "Handbook of School Regulations," which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools: "The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher . . . ." The Handbook also states that "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Finally the Handbook advises teachers to stimulate interest in religious vocations and missionary work. Given the mission of the church school, these instructions are consistent and logical.

Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school

affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent

of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures are attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" in *Walz* v. *Tax Commission, supra,* at 675, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

(b) *Pennsylvania program*

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed

for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen,* for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. *Board of Education* v. *Allen, supra,* at 243–244; *Everson* v. *Board of Education, supra,* at 18. In *Walz* v. *Tax Commission, supra,* at 675, the Court warned of the dangers of direct payments to religious organizations:

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ."

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now

provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and health manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment: Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969). The potential divisiveness of such conflict is a threat to the normal political process. *Walz* v. *Tax Commission, supra,* at 695

(HARLAN, J., concurring). See also *Board of Education* v. *Allen*, 392 U. S. 236, 249 (1968) (HARLAN, J., concurring); *Abington School District* v. *Schempp*, 374 U. S. 203, 307 (1963); (Goldberg, J., concurring). To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems which confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Of course, as the Court noted in *Walz*, "adherents of particular faiths and individual churches frequently take strong positions on public issues." *Walz* v. *Tax Commission*, *supra*, at 670. We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is thus likely to be intensified.

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands

as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

V

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably

bad; indeed, it is the way the Common Law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn.

The decision of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The decision of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970

Alton J. Lemon et al., Appellants, 89 *v.* David H. Kurtzman, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
John R. Earley et al., Appellants, 569 *v.* Joan DiCenso et al.	On Appeal From the United States District Court for the District of Rhode Island.
William P. Robinson, Jr., Commissioner of Education of the State of Rhode Island, et al., Appellants, 570 *v.* Joan DiCenso et al.	

[June 28, 1971]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court, I have expressed at some length my views as to the rationale of today's decision in these three cases.

They involve two different statutory schemes for providing aid to parochial schools. *Lemon* deals with the Pennsylvania Nonpublic Elementary and Secondary Education Act, L. 1968, Act 209. By its terms the Pennsylvania Act allows the State to provide funds di-

rectly to private schools to purchase "secular educational services" such as teachers' salaries, textbooks, and educational materials. 24 Pa. Stat. Ann. § 5604. Reimbursement for these services may be made only for courses in mathematics, modern foreign languages, physical science, and physical education. Reimbursement is prohibited for any course containing subject matter "expressing religious teaching, or the morals or forms of worship of any sect." 24 Pa. Stat. Ann. § 5603. To qualify a school must demonstrate that its pupils achieve a satisfactory level of performance in standardized tests approved by the Superintendent of Public Instruction, and that the textbooks and other instructional materials used in these courses have been approved by the Superintendent of Public Instruction. The three-judge District Court below upheld this statute against the argument violates the Establishment Clause. We noted probable jurisdiction. 397 U. S. 1034.

The *DiCenso* cases involve the Rhode Island Salary Supplement Act L. 1969, c. 246. The Rhode Island Act authorizes supplementing the salaries of teachers of secular subjects in nonprofit private schools. The supplement is not more than 15% of an eligible teacher's current salary but cannot exceed the maximum salary paid to teachers in the State's public schools. To be eligible a teacher must teach only those subjects offered in public schools in the State, be certified in substantially the same manner as teachers in public schools, and may use only teaching materials which are used in the public schools. Also he must agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements." R. I. Gen. Laws § 16–51–3. The schools themselves must not be operated for profit, must meet state educational standards, and the annual per student expenditure for secular education must not equal or exceed "the average per

student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year." R. I. Gen. Laws § 16–51–2. While the Rhode Island Act, unlike the Pennsylvania Act, provides for direct payments to the teacher, the three-judge District Court below found it unconstitutional because it "results in excessive government entanglement with religion." Probable jurisdiction was noted and the cases were set for oral argument with the other school establishment cases. 400 U. S. 901.

In *Walz* v. *Tax Commission,* 397 U. S. 664, 674, the Court in approving a tax exemption for church property said:

> "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."

There is in my view such an entanglement here. The surveillance or supervision of the States needed to police grants involved in these three cases, if performed, puts a public investigator in every classroom and entails a pervasive monitoring of these church agencies by the secular authorities. Yet if that surveillance or supervision is not done the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause. Moreover, when taxpayers of many faiths are required to contribute money for the propagation of one faith, the Free Exercise Clause is infringed.

The analysis of the constitutional objections to these two state systems of grants to parochial or sectarian schools must start with the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith. They also teach secular subjects; but they came into existence in this country

because Protestant groups were perverting the public schools by using them to propagate their faith. The Catholics naturally rebelled. If schools were to be used to propagate a particular creed or religion, then Catholic ideals should also be served. Hence the advent of parochial schools.

By 1840 there were 200 Catholic parish schools in the United States.[1] By 1964 there were 60 times as many.[2] Today 57% of the 9,000 Catholic parishes in the country have their church schools. "[e]very diocesan chancery has its school departments and it enjoys a primacy of stature."[3] The parish schools indeed consume 40 to 65% of the parish's total income.[4] The parish is so "school centered" that "the school almost becomes the very reason for being."[5]

Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible.[6] The contests between Protestants and Catholics, often erupting into violence including the burning of Catholic churches, is a twice-told tale;[7] the Know-Knothing Party, which included in its platform "daily Bible reading in the schools,"[8] carried three States in 1854—Massachusetts, Pennsylvania, and Delaware.[9] Parochial schools grew,

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[1] Stokes & Pfeffer, Church & State in the United States, p. 229 (1964).

[2] *Ibid.*

[3] Deedy, Should Catholic Schools Survive, New Rep. Mar. 13, 1971, pp. 15, 16.

[4] *Id.*, at 17.

[5] *Ibid.*

[6] Stokes & Pfeffer, *supra*, n. 1, at 231.

[7] *Id.*, at 231–239.

[8] *Id.*, at 237.

[9] *Ibid.*

but not Catholic schools alone. Other dissenting sects established their own schools—Lutherans, Methodists, Presbyterians, and others.[10] But the major force in shaping the pattern of education in this country was in the conflict between Protestants and Catholics. The Catholics logically argued that a public school was sectarian when it taught the King James version of the Bible. They therefore wanted it removed from the public schools; and in time they tried to get public funds for their own parochial schools.[11]

The constitutional right of dissenters to substitute their parochial schools for public schools was sustained by the Court in *Pierce* v. *Society of Sisters*, 268 U. S. 510.

The story of conflict and dissension is long and well-known. The result was a state of so-called equilibrium where religious instruction was eliminated from public schools and the use of public funds to support religious schools was deemed to be banned.[12]

But the hydraulic pressures created by political forces and by economic stress were great and they began to change the situation. Laws were passed—state and federal—that dispensed public funds to sustain religious schools and the plea was always in the educational frame of reference: education in all sectors was needed from languages to calculus to nuclear physics. And it was forcefully argued that a linguist or mathematician or physicist trained in a religious schools was equally competent with those trained in secular schools.

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[10] Butts, The American Tradition in Religion and Education, p. 115 (1950).

[11] *Id.*, at 118. And see Finney, A Brief History of the American Public School, pp. 44–45 (1925).

[12] See Knight, Education in the United States, pp. 3, 314 (1951); Cubberly, Public Education in the United States, pp. 164 *et seq.* (1919).

And so we have gradually edged into a situation where vast amounts of public funds are supplied each year to sectarian schools.[13]

And the argument is made that the private parochial school system takes about $9 billion a year off the back of government [14]—as if that were enough to justify violating the Establishment Clause.

While the evolution of the public school system in this country marked an escape from denominational control and was therefore admirable as seen through the eyes of those who think like Madison and Jefferson, it has disadvantages. The main one is that a state system may attempt to mold all students alike according to the views of the dominant group and to discourage the emergence of idiosyncracies of individuals.

Sectarian education, however, does not remedy that condition. The advantages of sectarian education relate solely to religious or doctrinal matters. They give the church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses.

Many nations follow that course: Moslem nations teach the Koran in their schools; Sweden vests her elementary education in the parish; Newfoundland puts its school system under three superintendents—one from the Church of England, one from the Catholic church, one from the United Church. In Ireland the public schools

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[13] In 1960 the Federal Government provided $500 million to private colleges and universities. Amounts contributed by state and local governments to private schools at any level were negligible. Just one decade later federal aid to private colleges and universities had grown to $2.1 billion. State aid had begun and reached $100 million. Statistical Abstract of the United States 105 (1970). As the present cases demonstrate we are now reaching a point where state aid is being given to private elementary and secondary schools as well as colleges and universities.

[14] Deedy, *supra*, n. 3, at 16.

are under denominational managership—Catholic, Episcopalian, Presbyterian, and Hebrew.

England puts sectarian schools under the umbrella of its school system. It finances sectarian education; it exerts control by prescribing standards; it requires some free scholarships; it provides nondenominational membership on the board of directors.[15]

The British system is, in other words, one of surveillance over sectarian schools. We too have surveillance over sectarian schools but only to the extent of making sure that minimum educational standards are met, *viz.*, competent teachers, accreditation of the school for diplomas, the number of hours of work and credits allowed, and so on.

But we have never faced, until recently, the problem of policing sectarian schools. Any surveillance to date has been minor and has related only to the consistently unchallenged matters of accreditation of the sectarian school in the State's school system.[16]

The Rhode Island Act allows a supplementary salary to a teacher in a sectarian school if he or she "does not teach a course in religion."

The Pennsylvania Act provides for state financing of instruction in mathematics, modern foreign languages, physical science, and physical education provided that the instruction in those courses "shall not include any subject matter expressing religious teaching or the morals or form of worship of any sect."

Public financial support of parochial schools puts those schools under disabilities with which they were not previously burdened. For as we held in *Cooper* v. *Aaron*,

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[15] Curtis, History of Education in Great Britain, pp. 316–383 (1963); Alexander, Education in England, c. II (1964).

[16] See *Pierce* v. *Society of Sisters*, 268 U. S., at 534; *Meyer* v. *Nebraska*, 262 U. S. 390, 402.

358 U. S. 1, 19, governmental activities relating to schools "must be exercised consistently with constitutional requirements." There we were concerned with the equal protection; here we are faced with issues of Establishment of religion and its Free Exercise as those concepts are used in the First Amendment.

Where the governmental activity is the financing of the private school, the various limitations or restraints imposed by the Constitution on state governments come into play. Thus Arkansas as part of its attempt to avoid the consequences of *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, withdrew its financial support from some public schools and sent the funds instead to private schools. That state action was held to violate the Equal Protection Clause. *Aaron* v. *McKinley*, 173 F. Supp. 944, 952. We affirmed *sub nom. Faubus* v. *Aaron*, 361 U. S. 197. Louisiana tried a like tactic and it too was invalidated. *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686. Again we affirmed. 393 U. S. 17. Whatever might be the result in case of grants to students,[17] it is clear that once one of the States finances a private school, it is duty bound to make certain that the school stays within secular bounds and does not use the public funds to promote sectarian causes.

The government may of course finance a hospital though it is run by a religious order, provided it is open

[17] Grants to students in the context of the problems of desegregated public schools have without exception been stricken down as tools of the forbidden discrimination. See *Griffin* v. *Prince Edward Co.*, 377 U. S. 218; *Hall* v. *St. Helena Parish*, 197 F. Supp. 649, aff'd, 368 U. S. 515; *Lee* v. *Macon County Bd.*, 267 F. Supp. 458, aff'd, 389 U. S. 215; *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, aff'd, 389 U. S. 571; *Brown* v. *South Carolina State Board*, 296 F. Supp. 199, aff'd, 393 U. S. 222; *Coffey* v. *State Educ. Finance Commission*, 296 F. Supp. 1389; *Lee* v. *Macon County Bd.*, 231 F. Supp. 743.

to people of all races and creeds. *Bradfield* v. *Roberts*, 175 U. S. 291. The government itself could enter the hospital business; and it would of course make no difference if its agents who ran its hospitals were Catholics, Methodists, agnostics, or what not. For the hospital is not indulging in religious instruction or guidance or indoctrination. As Mr. Justice Jackson said in *Everson* v. *Board of Education*, 330 U. S. 1, 26 (dissenting):

> "[Each State has] great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character.'"

The reason is that given by Madison in his Remonstrance.[18]

> ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment . . . ."

When Madison in his Remonstrance attacked a taxing measure to support religious activities, he advanced a series of reasons for opposing it. One that is extremely relevant here was phrased as follows: [19] ". . . it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has

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[18] Remonstrance ¶ 3. The Memorial & Remonstrance Against Religious Assessment has been reproduced in appendices to the opinion of Rutledge, J., in *Everson*, 330 U. S., at 63, and to that of DOUGLAS, J., in *Walz*, 397 U. S., at 719.

[19] Remonstrance ¶ 11.

produced amongst its several sects." Intermeddling, to use Madison's word, or "entanglement," to use what was said in *Walz*, has two aspects. The intrusion of government into religious schools through grants, supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith. Those activities of the State may also intrude on the Free Exercise Clause by depriving a teacher, under threats of reprisals, of the right to give sectarian construction or interpretation of, say, history and literature, or to use the teaching of such subjects to inculcate a religious creed or dogma.

Under these laws there will be vast governmental suppression, surveillance, or meddling in church affairs. As I indicated in *Tilton* v. *Richardson, ante*, —, decided this day, school prayers, the daily routine of parochial schools, must go if our decision in *Engel* v. *Vitale*, 370 U. S. 421, is honored. If it is not honored, then the state has established a religious sect. Elimination of prayers is only part of the problem. The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula. What is palpably a sectarian course can be marked for deletion. But the problem only starts there. Sectarian instruction, in which of course a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught?* We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class.[20]

[20] "In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the

It is well-known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind. Rev. Joseph H. Fichter, S. J., stated in Parochial Schools: A Sociological Study, 86 (1958):

> "It is a commonplace observation that in the parochial school religion permeates the whole curriculum and is not confined to a single half hour period of the day. Even arithmetic can be used as an instrument of pious thought, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?' "

One can imagine what a religious zealot, as contrasted to a civil liberatarian, can do with the Reformation or with the Inquisition. Much history can be given the gloss of a particular religion. I would think that policing these grants to detect sectarian instruction would be insufferable to religious partisans and would breed division and dissension between church and state.

This problem looms large where the church controls the hiring and firing of teachers:

> ". . . in the public school the selection of a faculty and the administration of the school usually rests

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very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think." Boettner, Roman Catholicism, p. 360 (1970).

with a school board which is subject to election and recall by the voters, but in the parochial school the selection of a faculty and the administration of the school is in the hands of the bishop alone, and usually is administered through the local priest. If a faculty member in the public school believes that he has been treated unjustly in being disciplined or dismissed, he can seek redress through the civil court and he is guaranteed a hearing. But if a faculty member in a parochial school is disciplined or dismissed he had no recourse whatsoever. The word of the bishop or priest is final, even without explanation if he so chooses. The tax payers have a voice in the way their money is used in the public school, but the people who support a parochial school have no voice at all in such affairs." Boettner, Roman Catholicism, p. 375 (1970).

Board of Education v. *Allen,* 392 U. S. 236, dealt only with textbooks. Even so some had difficulty giving approval. Yet books can be easily examined independently of other aspects of the teaching process. In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.

Lemon involves a state statute that prescribes that courses in mathematics, modern foreign languages, physical science, and physical education "shall not include any subject matter expressing religious teaching or the morals or form of worship of any sect." The subtleties involved in applying this standard are obvious. It places the State astride a sectarian school and gives it power

to dictate what is or is not secular, what is or is not religious. I can think of no more disrupting influence apt to promote rancor and ill-will between church and state than this kind of surveillance and control. They are the very opposite of the "moderation and harmony" between church and state which Madison thought was the aim and purpose of the Establishment Clause.

The *DiCenso* cases have all the vices which are in *Lemon*, because the supplementary salary payable to the teacher is conditioned on him or her not teaching "a course in religion."

Moreover, the *DiCenso* cases reveal another but related knotty problem presented when church and state launch one of these educational programs. The Bishop of Rhode Island has a Handbook of School Regulations for the Diocese of Providence.[21]

The school board supervises "the education, both spiritual and secular, in the parochial schools and diocesan high schools."

The superintendent is an agent of the bishop and he interprets and makes "effective state and diocesan educational directives."

The pastors visit the schools and "give their assistance in promoting spiritual and intellectual discipline."

Community supervisors "assist the teacher in the problems of instruction" and these duties are:

> "I. To become well enough acquainted with the teachers of their communities so as to be able to advise the community superiors on matters of placement and reassignment.
>
> "II. To act as liaison between the provincialate and the religious teacher in the school.

[21] It was said on oral argument that the handbook shown as an exhibit in the record had been superseded. The provisions hereinafter quoted are from the handbook as it reads after all the deletions to which we were referred.

"III. To cooperate with the superintendent by studying the diocesan school regulations and to encourage the teachers of their community to observe these regulations.

"IV. To avoid giving any orders or directions to the teachers of their community that may be in conflict with diocesan regulations or policy regarding curriculum, testing, textbooks, method, or administrative matters.

"V. To refer questions concerning school administration beyond the scope of their own authority to the proper diocesan school authorities, namely, the superintendent of schools or the pastor."

The length of the school day includes mass:

"A full day session for Catholic schools at the elementary level consists of five and one-half hours, exclusive of lunch and Mass,[22] but inclusive of recess for pupils in grades 1–3."

A course of study or syllabus prescribed for an elementary or secondary school is "mandatory."

Religious instruction is provided as follows:

"A. Systematic religious instructions must be provided in all schools of the diocese.

"B. Modern catechetics requires a teacher with unusual aptitudes, specialized training, and such unction of the spirit that his word possess the force of a personal call. He should be so filled with his subject that he can freely improvize in discussion, dramatization, drawing, song, and prayer. A teacher so gifted and so permeated by the message of the Gospel is rare. Perhaps no teacher in a given school

[22] "The use of school time to participate in the Holy Sacrifice of the Mass on the feasts of All Saints, Ascension, and the patronal saint of the parish or school, as well as during the 40 Hours Devotion, is proper and commendable."

attains that ideal. But some teachers come nearer it than others. If our pupils are to hear the Good News so that their minds are enlightened and their hearts respond to the love of God and His Christ, if they are to be formed into vital, twentieth-century Christians, they should receive their religious instructions only from the very best teachers.

"C. Inasmuch as the textbooks employed in religious instruction above the fifth grade require a high degree of cathechetical preparation, religion should be a departmentalized subject in grade six through twelve."

Religious activities are provided, through observance of specified holy days and participation in mass.

"Religious formation" is not restricted to courses but is achieved "through the example of the faculty, the tone of the school, and religious activities."

No unauthorized priest may address the students.

"Retreats and days of recollection form an integral part of our religious program in the Catholic schools."

Religious factors are used in the selection of students:

"Although wealth should never serve as a criterion for accepting a pupil into a Catholic school, all other things being equal, it would seem fair to give preference to a child whose parents support the parish. Regular use of the budget, rather than the size of the contributions, would appear equitable. It indicates whether parents regularly attend Mass."

These are only highlights of the handbook. But they indicate how pervasive is the religious control over the school and how remote this type of school is from the secular school. Public funds supporting that structure are used to perpetuate a doctrine and creed in innumerable and in pervasive ways. Those who man these

schools are good people, zealous people, dedicated people. But they are dedicated to ideas that the Framers of our Constitution placed beyond the reach of government.

If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension.

We have announced over and again that the use of taxpayers' money to support parochial schools violates the First Amendment, applicable to the States by virtue of the Fourteenth.

We said in unequivocal words in *Everson* v. *Board of Education,* 330 U. S. 1, 16, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We reiterated the same idea in *Zorach* v. *Clauson,* 343 U. S. 306, 314, and in *McGowan* v. *Maryland,* 366 U. S. 420, 443, and in *Torcaso* v. *Watkins,* 367 U. S. 488, 493. We repeated the same idea in *McCallum* v. *Board of Education,* 333 U. S. 203, 210, and added that a State's tax-supported public schools could not be used "for the dissemination of religious doctrines" nor could a State provide the church "pupils for their religious classes through use of the State's compulsory school machinery." *Id.,* at 212.

Yet in spite of this long and consistent history there are those who have the courage to announce that a State may nonetheless finance the *secular* part of a sectarian school's educational program. That, however, makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries. A history class, a literature class, a science class in a parochial school is not a separate institute; it is part of the organic

whole which the State subsidizes. The funds are used in these cases to pay or help pay the salaries of teachers in parochial schools; and the presence of teachers is critical to the essential purpose of the parochial school, *viz.* to advance the religious endeavors of the particular church. It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proseletyzing enables the school to use all of its own funds for religious training. As Judge Coffin said, —— F. Supp. ——, we would be blind to realities if we let "sophisticated bookkeeping" sanction "almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." And sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones. *Lane* v. *Wilson,* 307 U. S. 268, 275.

In my view the taxpayers' forced contribution to the parochial schools in the present cases violates the First Amendment.

MR. JUSTICE MARSHALL took no part in the consideration or decision of No. 89. While intimating no view as to the continuing vitality of *Everson* v. *Board of Education,* 330 U. S. 1 (1947), he concurs in MR. JUSTICE DOUGLAS' opinion covering Nos. 569 and 570.

SUPREME COURT OF THE UNITED STATES

Nos. 89, 569, AND 570.—OCTOBER TERM, 1970*

Alton J. Lemon et al., Appellants, 89 *v.* David H. Kurtzman, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.
John R. Earley et al., Appellants, 569 *v.* Joan DiCenso et al.	On Appeal From the United States District Court for the District of Rhode Island.
William P. Robinson, Jr., Commissioner of Education of the State of Rhode Island, et al., Appellants, 570 *v.* Joan DiCenso et al.	

[June 28, 1971]

MR. JUSTICE BRENNAN.

I agree that the judgment in Nos. 569 and 570 must be affirmed. In my view the judgment in No. 89 must be reversed outright. I dissent in No. 153 insofar as the plurality opinion and the opinion of my Brother WHITE sustain the constitutionality, as applied to sectarian institutions, of the Federal Higher Education Facilities Act. 20 U. S. C. §§ 711 *et seq.* (Supp. 1969). In my

*Together with No. 153, *Eleanor Taft Tilton et al.* v. *Elliot L. Richardson et al.*

view that Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent. I therefore think that our remand of the case should be limited to the direction of a hearing to determine whether the four institutional appellees here are sectarian institutions.

I continue to adhere to the view that to give concrete meaning to the Establishment Clause

> "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government." *Abington School District* v. *Schempp*, 374 U. S. 203, 294–295 (1963) (concurring opinion); *Walz* v. *Tax Commission*, 397 U. S. 664, 680–681 (1970) (concurring opinion).

The common feature of all three statutes before us is the provision of a direct subsidy from public funds for activities carried on by sectarian educational institutions. We have sustained the reimbursement of parents for bus

fares of students under a scheme applicable to both public and nonpublic schools, *Everson* v. *Board of Education*, 330 U. S. 1 (1947). We have also sustained the loan of textbooks in secular subjects to students of both public and nonpublic schools, *Board of Education* v. *Allen*, 392 U. S. 236 (1968). See also *Bradfield* v. *Roberts*, 175 U. S. 291 (1899).

The statutory schemes before us, however, have features not present in either the *Everson* or *Allen* schemes. For example, the reimbursement or the loan of books ended government involvement in *Everson* and *Allen*. In contrast each of the schemes here exacts a promise in some form that the subsidy will not be used to finance courses in religious subjects—promises which must be and are policed to assure compliance. Again, although the federal subsidy, similar to the *Everson* and *Allen* subsidies, is available to both public and nonpublic colleges and universities, the Rhode Island and Pennsylvania subsidies are restricted to nonpublic schools, and for practical purposes to Roman Catholic parochial schools.[1]

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[1] At the time of trial, 95% of the elementary school children in private schools in Rhode Island attended Roman Catholic Schools. Only nonpublic school teachers could receive the subsidy and then only if they taught in schools in which the average per pupil expenditure on secular education did not exceed the average for the State's public schools. Some 250 of the 342 lay teachers employed in Rhode Island Roman Catholic schools had applied for and been declared eligible for the subsidy. To receive it the teacher must (1) have a state teaching certificate; (2) teach exclusively secular subjects taught in the state's public schools; (3) use only teaching materials approved for use in the public schools; (4) not teach religion; and (5) promise in writing not to teach a course in religion while receiving the salary supplement.

Unlike the Rhode Island case, the Pennsylvania case lacks a factual record since the complaint was dismissed on motion. We must therefore decide the constitutional challenge as addressed to the face of the Pennsylvania statute. Appellants allege that the nonpublic schools are segregated in Pennsylvania by race and religion and that

These and other features I shall mention mean for me that *Everson* and *Allen* do not control these cases. Rather the history of public subsidy of sectarian schools, and the purposes and operation of these particular statutes must be examined to determine whether the statutes breach the Establishment Clause. *Walz* v. *Tax Commission, supra,* at 681.

I

In sharp contrast to the "undeviating acceptance given religious tax exemptions from our earliest days as a Nation," *ibid.,* subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed. Public education was of course virtually nonexistent when the Constitution was adopted. Colonial Massachusetts in 1647 had directed towns to establish schools, Benjamin Franklin in 1749 proposed a Philadelphia Academy and Jefferson labored to establish a public school system in Virginia.[2] But these were the exceptions. Education in the Colonies was overwhelmingly a private enterprise, usually carried on as a denominational activity by the dominant Protestant sects. In point of fact, government generally looked to the church to provide education, and often contributed support through donations of land and money. E. Cubberley, Public Education in the United States 171 (1918).

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the Act perpetrates and promotes the segregation of races "with the ultimate result of promoting two school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior." Brief for Appellants Lemon et al. 9. The District Court held that appellants lacked standing to assert this equal protection claim. In my view this was plain error.

[2] E. Cubberley, Public Education in the United States 17 (1918); *Abington School District* v. *Schempp,* 374 U. S. 203, 238 n. 7 and authorities cited therein.

Nor was there substantial change in the years immediately following ratification of the Constitution and the Bill of Rights. Schools continued to be local and, in the main, denominational institutions.[3] But the demand for public education soon emerged. The evolution of the struggle in New York City is illustrative.[4] In 1786, the first New York state legislature ordered that one section in each township be set aside for the "gospel and schools." With no public schools, various private agencies and churches operated "charity schools" for the poor of New York City and received money from the state common school fund. The forerunner of the city's public schools was organized in 1805 when DeWitt Clinton founded "The Society for Establishment of a Free School in the City of New York for the Education of such poor Children as do not belong to or are not provided for by any Religious Society." The State and city aided the society, and it built many schools. Gradually, however, competition and bickering among the Free School Society and the various church schools developed over the apportionment of state school funds. As a result, in 1825, the legislature transferred to the city council the responsibility for distributing New York City's share of the state funds. The council stopped funding religious societies which operated 16 sectarian schools but continued supporting schools connected with the Protestant Orphan Asylum Society. Thereafter, in 1831, the Catholic Orphan Asylum Society demanded and received public funds to operate its schools but a request of Methodists for funds for the same purpose was denied. Nine years later, the Catholics enlarged their request for public monies to include all parochial schools, contending that

[3] C. Antieau, A. Downey, E. Roberts, Freedom from Federal Establishment 174 (1964).

[4] B. Congrey, Secularism in American Education: Its History 127–129 (1931).

the council was subsidizing sectarian books and instruction of the Public School Society, which Clinton's Free School Society had become. The city's Scotch Presbyterian and Jewish communities immediately followed with requests for funds to finance their schools. Although the Public School Society undertook to revise its texts to meet the objections, in 1842, the state legislature closed the bitter controversy by enacting a law that established a City Board of Education to set up free public schools, prohibited the distribution of public funds to sectarian schools, and prohibited the teaching of sectarian doctrine in any public school.

The Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization soon led to widespread demands throughout the States for secular public education. At the same time strong opposition developed to use of the State's taxing powers to support private sectarian schools.[5] Although the controversy over religious exercises in the public schools continued into this century, *Schempp*, 374 U. S., at 268–277, the opponents of subsidy to sectarian schools had largely won their fight by 1900. In fact, after 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded. E. Cubberley, *supra*, at 179. Between 1840 and 1875, 19 States added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools, *id.*, at 180, and by 1900, 16 more States had added similar provisions. In fact, no State admitted to the Union after 1858, except West Virginia, omitted such provision in its first constitution. *Ibid.* Today fewer than a half-dozen States

[5] See generally R. Butts, The American Tradition in Religion and Education 111–145 (1950); A. Stokes, Church and State in the United States 47–72 (1950); E. Cubberley, *supra* n. 2, at 155–181.

omit such provisions from their constitutions.[6] And in 1897, Congress included in its appropriation act for the District of Columbia a statement declaring it

> "to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or

[6] See Ala. Const. Art. XIV, § 263; Alaska Const. Art. VII, § 1; Ariz. Const. Art. II, § 12, Art. XI, § 7, Art. XI, § 8; Ark. Const. Art. XIV, § 2; Calif. Const. Art. IX, § 8; Colo. Const. Art. IX, § 7; Conn. Const. Art. VIII, § 4; Del. Const. Art. X, § 3; Fla. Const. Decl. of Rights § 3; Ga. Const. Art. VIII, § XII, par. 2 (1966); Hawaii Const. Art. IX, § 1; Idaho Const. Art. VIII, § 3; Ill. Const. Art. VIII, § 3; Ind. Const. Art. 8, § 3; Kan. Const. Art. 6, § 6 (c); Ky. Const. § 189; La. Const. Art. XII, § 13; Mass. Const. Amend. Art. XLVI, § 2; Mich. Const. Art. I, § 4; Minn. Const. Art. VIII, § 2; Miss. Const. Art. 8, § 208; Mo. Const. Art. IX, § 8; Mont. Const. Art. XI, § 8; Neb. Const. Art. VII, § 11; Nev. Const. Art. 11, § 10; N. H. Const. Pt. II, Art. 83; N. J. Const. Art. VIII, § 4, par. 2; N. Mex. Const. Art. XII, § 3; N. Y. Const. Art. XI, § 3; N. Car. Const. Art. IX, §§ 4, 12; N. Dak. Const. Art. VIII, § 152; Ohio Const. Art. VI, § 2; Okla. Const. Art. II, § 5; Ore. Const. Art. VIII, § 2; Penn. Const. Art. 3, § 15; R. I. Art. 12, § 4; S. Car. Art. XI, § 9; S. Dak. Const. Art. VIII, § 16; Tenn. Const. Art. XI, § 12; Tex. Const. Art. VII, § 5; Utah Const. Art. 10, § 13; Va. Const. Art. X, § 141; Wash. Const. Art. IX, § 4; W. Va. Const. Art. XII, § 4; Wis. Const. Art. I, § 18, Art. X, § 2; Wyo. Const. Art. VII, § 8.

The overwhelming majority of these constitutional provisions either prohibit expenditures of public funds on sectarian schools, or prohibit the expenditure of public school funds for any purpose other than support of public schools. For a discussion and categorization of the various constitutional formulations, see Note, Catholic Schools and Public Money, 50 Yale L. J. 917 (1941). Many of the constitutional provisions are collected in B. Confrey, Secularization in American Education: Its History 47–125 (1931).

Many state constitutions explicitly apply the prohibition to aid to sectarian colleges and universities. See, *e. g.*, Colo. Const. Art. IX, § 7; Idaho Art. IX, § 5; Ill. Art. VIII, § 3; Kan. Art. 6, § 6 (c); Mass. Const. Amend. Art. XLVI, § 2; Mo. Art. IX, § 8; Mont. Const. Art. XI, § 8; Neb. Const. Art. VII, § 11; N. Mex. Const. Art. XII,

aiding by payment for services, expense, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control." 29 Stat. 411.

Thus for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions.[7] If this history is not itself compelling against the validity of the three subsidy statutes, in the sense we found in *Walz* that "undeviating acceptance" was highly significant in favor of the validity of religious tax exemption, other forms of governmental involvement which each of the three statutes requires tips the scales in my view against the validity of each of them. These are involvements which threaten "dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government." *Schempp*, 374 U. S., at 295. "[G]overnment and religion have discrete interests which are mutually best served when each

§ 3; S. Car. Const. Art. XI, § 9; Utah Const. Art. 10, § 13; Wyo. Const. Art. VII, § 8. At least one judicial decision construing the word "schools" held that the word does not include colleges and universities, Opinion of the Justices, 214 Mass. 599, 102 N. E. 464 (1913), but that decision was overruled by constitutional amendment. Mass. Const. Amend. Art. XLVI, § 2.

[7] See, *e. g.*, *Wright* v. *School Dist.*, 151 Kan. 485, 99 P. 2d 737 (1940); *Atchison, T. & S. F. R. Co.* v. *City of Atchison*, 47 Kan. 712, 28 P. 1000 (1892); *Williams* v. *Board of Trustees*, 173 Ky. 708, 191 S. W. 507 (1917); Opinion of the Justices, 214 Mass. 599, 102 N. E. 464 (1913); *Jenkins* v. *Andover*, 103 Mass. 94 (1869); *Otken* v. *Lamkin*, 56 Miss. 758 (1879); *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S. W. 2d 609 (1942); *State ex rel. Public School Dist.* v. *Taylor*, 122 Neb. 454, 240 N. W. 573 (1932); *State ex rel. Nevada Orphan Asylum* v. *Halleck*, 16 Nev. 373 (1882); *Dakota Synod* v. *State*, 2 S. D. 366, 50 N. W. 632 (1891).

avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *Id.*, at 259. All three of these statutes require "too close proximity" of government to the subsidized sectarian institutions and in my view create real dangers of "the secularization of a creed."

II

The Rhode Island statute requires Roman Catholic teachers to surrender their right to teach religion courses and to promise not to "inject" religious teaching into their secular course. This has led at least one teacher to stop praying with his classes,[8] a concrete testimonial to the self-censorship that inevitably accompanies state regulation of delicate First Amendment freedoms. Cf. *Smith* v. *California*, 361 U. S. 147 (1959); *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). Both the Rhode Island and Pennsylvania statutes prescribe extensive standardization of the content of secular courses, and of the teaching materials and textbooks to be used in teaching the courses. And the regulations to implement those requirements necessarily require policing of instruction in the schools. The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined spectre of governmental "secularization of a creed."

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[8] "Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy." 316 F. Supp., at 121.

The same dangers attend the federal subsidy even if less obviously. The Federal Government exacts a promise that no "sectarian instruction" or "religious worship" will take place in a subsidized building. The Office of Education polices the promise.[9] In one instance federal officials demanded that a college cease teaching a course entitled "The History of Methodism" in a federally assisted building, although the Establishment Clause "plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history." *Schempp*, 374 U. S., at 300. These examples illustrate the complete incompatibility of such surveillance with the restraints barring interference with religious freedom.[10]

Policing the content of courses, the specific textbooks used, and indeed the words of teachers is far different from the legitimate policing carried on under state compulsory attendance laws or laws regulating minimum

[9] The Office of Education stipulated as follows:

"The Office of Education is now engaged in making a series of on-site reviews of completed projects to verify that conditions under which Federal assistance was provided are being implemented. During these visits, class schedules and course descriptions contained in the school catalog are analyzed to ascertain that nothing in the nature of sectarian instruction is scheduled in any area constructed with the use of Federal funds. If there is found to be an indication that a portion of academic facilities constructed with Federal assistance is used in any way for sectarian purposes, *either the questionable practice must be terminated* or the institution must assume full responsibility for the cost of constructing the area involved." App. 82 (emphasis added).

[10] The plurality opinion in No. 143 would strike down the 20-year "period of Federal interest," 20 U. S. C. § 754 (a), upon the ground that "The restrictive obligations of a recipient institution under § 751 (a)(2) cannot, compatible with the Religion Clause, expire while the building has substantial value." *Ante*, p. —. Thus the surveillance constituting the "too close proximity" which for me offends the Establishment Clause continues for the life of the building.

levels of educational achievement. Government's legitimate interest in ensuring certain minimum skill levels and the acquisition of certain knowledge does not carry with it power to prescribe what shall *not* be taught, or what methods of instruction shall be used, or what opinions the teacher may offer in the course of teaching.

Moreover, when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection. The District Court in the Rhode Island case pinpointed the dilemma:

> "Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies and in hiring and firing of teachers. At some point the school becomes 'public' for more purposes than the Church would wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause." 316 F. Supp., at 121–122 (citations omitted).

III

In any event, I do not believe that elimination of these aspects of "too close proximity" would save these three statutes. I expressed the view in *Walz* that "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." 397 U. S., at 690. I do not think the subsidies under these statutes fall outside "general subsidies of religious activities" merely because they are restricted to support of the teaching of secular subjects. In *Walz*, the passive aspect of the benefits conferred by a tax exemption, particularly since cessation of the exemptions might easily lead to impermissible involvements and conflicts, led me to con-

clude that exemptions were consistent with the First Amendment values. However, I contrasted direct government subsidies:

> "Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, '[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches' while '[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.' Thus, 'the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church.'" 397 U. S., at 690–691 (footnotes and citations omitted).

Pennsylvania, Rhode Island, and the Federal Government argue strenuously that the government monies in all these cases are not "general subsidies of religious activities" because they are paid specifically and solely for the secular education that the sectarian institutions provide.[11]

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[11] The Pennsylvania statute differs from Rhode Island's in providing the subsidy without regard to whether the sectarian school's average per pupil expenditure on secular education exceeds the average of the State's public schools. Nor is there any limitation of the subsidy to nonpublic schools that are financially embarassed. Thus the statute on its face permits use of the state subsidy for the

Before turning to the decisions of this Court on which this argument is based, it is important to recall again the history of subsidies to sectarian schools. See Part I, *supra*. The universality of state constitutional provisions forbidding such grants, as well as the weight of judicial authority disapproving such aid as a violation of our tradition of separation of church and state, reflects a time-tested judgment that such grants do indeed constitute impermissible aid to religion. See nn. 6 and 7, *supra*. The recurrent argument, consistently rejected in the past, has been that government grants to sectarian schools ought not be viewed as impermissible subsidies "because [the schools] relieve the state of a burden which it would otherwise be itself required to bear . . . . they will render a service to the state by performing for it its duty of educating the children of its people." *Cook County* v. *Chicago Industrial School*, 125 Ill. 540, 571, 18 N. E. 183, 197 (1888).

Nonetheless, it is argued once again in these cases that sectarian schools and universities perform two separable functions. First, they provide secular education, and second, they teach the tenets of a particular sect. Since the State has determined that the secular education provided in sectarian schools serves the legitimate state interest in the education of its citizens, it is contended that state aid solely to the secular education function does not involve the State in aid to religion. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Board of Education* v. *Allen*, *supra*, are relied on as support for the argument.

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purpose of maintaining or attracting an audience for religious education, and also permits sectarian schools not needing the aid to apply it to exceed the quality of secular education provided in public schools. These features of the Pennsylvania scheme seem to me to invalidate it under the Establishment Clause as granting preferences to sectarian schools.

Our opinion in *Allen* recognized that sectarian schools provide both a secular and a sectarian education:

> "[T]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), the Court held that . . . Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view of the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters.
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> . . . . . .
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> "[T]he continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." *Board of Education* v. *Allen*, 392 U. S., at 245, 247–248 (footnote omitted).

But I do not read *Pierce* or *Allen* as supporting the proposition that public subsidy of a sectarian institution's secular training is permissible state involvement. I read them as supporting the proposition that as an identifiable set of skills and an identifiable quantum of knowledge, secular education may be effectively provided either in the religious context of parochial schools, or outside the context of religion in public schools. The State's interest in secular education may be defined broadly as an interest in ensuring that all children within its boundaries acquire a minimum level of competency in certain skills, such as reading, writing, and arithmetic, as well as a minimum

amount of information and knowledge in certain subjects such as history, geography, science, literature, and law. Without such skills and knowledge, an individual will be at a severe disadvantage both in participating in democratic self-government and in earning a living in a modern industrial economy. But the State has no proper interest in prescribing the precise forum in which such skills and knowledge are learned since acquisition of this secular education is neither incompatible with religious learning, nor is it inconsistent with or inimical to religious precepts.

When the same secular educational process occurs in both public and sectarian schools, *Allen* held that the State could provide secular textbooks for use in that process to students in both public and sectarian schools. Of course, the State could not provide textbooks giving religious instruction. But since the textbooks involved in *Allen* would, at least in theory, be limited to secular education, no aid to sectarian instruction was involved.

More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, 392 U. S., at 244 n. 6, no aid to the institution was involved. Rather, as in the case of the bus transportation in *Everson*, the general program of providing all children in the State with free secular textbooks assisted all parents in schooling their children. And as in *Everson*, there was undoubtedly the possibility that some parents might not have been able to exercise their constitutional right to send their children to parochial school if the parents were compelled themselves to pay for textbooks. However, as my Brother BLACK wrote for the Court in *Everson*,

> "cutting off church schools from these [general] services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obvi-

> ously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U. S., at 18.

Allen, in my view, simply sustained a statute in which the State was "neutral in its relations with groups of religious believers and non-believers." The only context in which the Court in *Allen* employed the distinction between secular and religious in a parochial school was to reach its conclusion that the textbooks that the State was providing could and would be secular.[12] The present cases, however, involve direct subsidies of tax monies to the schools themselves and we cannot blink the fact that the secular education those schools provide goes hand in hand with the religious mission which is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.

The District Court in *Di Censo* found that all the varied aspects of the parochial school's program—the nature of its faculty, its supervision, decor, program, extracurricular activities, assemblies, courses, etc.—produced an "intangible 'religious atmosphere,' " since the "diocesan school system is an integral part of the religious mission of the Catholic Church" and "a powerful vehicle for the transmitting of the Catholic faith to the next generation." 316 F. Supp., at 117. Quality teaching in secular subjects is an integral part of this religious enterprise. "Good secular teaching is as essential to the religious mission of the parochial school as a roof for the

[12] The three dissenters in *Allen* focused primarily on their disagreement with the Court that the textbooks provided would be secular. See 392 U. S., at 252–253 (BLACK, J., dissenting); *id.*, at 257 (DOUGLAS, J., dissenting) *id.*, at 270 (Fortas, J., dissenting).

school or desks for the classrooms." 316 F. Supp., at 117–118. That teaching cannot be separated from the environment in which it occurs, for its integration with the religious mission is both the theory and the strength of the religious school.

The common ingredient of the three prongs of the test set forth at the outset of this opinion is whether the statutes involve government in the "essentially religious activities" of religious institutions. My analysis of the operation, purposes, and effects of these statutes leads me inescapably to the conclusion that they do impermissibly involve the States and the Federal Government with the "essentially religious activities" of sectarian educational institutions. More specifically, for the reasons stated, I think each government uses "essentially religious means to serve governmental ends where secular means would suffice." This Nation long ago committed itself to primary reliance upon publicly supported public education to serve its important goals in secular education. Our religious diversity gave strong impetus to that commitment.

> "[T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . . The public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heri-

> tage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic." *Schempp*, 374 U. S., at 241–242 (citation omitted).

I conclude that, in using sectarian institutions to further goals in secular education, the three statutes do violence to the principle that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." *Schempp, supra*, at 265.

IV

The plurality's treatment of the issues in *Tilton*, No. 153, diverges so substantially from my own that I add these further comments. I believe that the Establishment Clause forbids the Federal Government to provide funds to sectarian universities in which the propagation and advancement of a particular religion is a function or purpose of the institution. Since the District Court made no findings whether the four institutional appellees here are sectarian, I would remand the case to the District Court with directions to determine whether the institutional appellees are "sectarian" institutions.

I reach this conclusion for the reasons I have stated: the necessarily deep involvement of government in the religious activities of such an institution through the policing of restrictions, and the fact that subsidies of tax monies directly to a sectarian institution necessarily aids the proselytizing function of the institution. The plurality argues that neither of these dangers is present.[13]

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[13] Much of the plurality's argument is directed at establishing that the specific institutional appellees here, as well as most church-related colleges, are not sectarian in that they do not have a purpose or function to advance or propagate a specific religion. Those questions must await hearings and findings by the District Court.

At the risk of repetition, I emphasize that a sectarian university is the equivalent in the realm of higher education of the Catholic elementary schools in Rhode Island; it is an educational institution in which the propagation and advancement of a particular religion is a primary function of the institution. I do not believe that construction grants to such a sectarian institution are permissible. The reason is not that religion "permeates" the secular education that is provided. Rather, it is that the secular education is provided within the environment of religion; the institution is dedicated to two goals, secular education *and* religious instruction. When aid flows directly to the institution, both functions benefit. The plurality would examine only the activities that occur within the federally assisted building and ignore the religious nature of the school of which it is a part. The "religious enterprise" aided by the construction grants involves the maintenance of an educational environment—which includes high-quality, purely secular educational courses—within which religious instruction occurs in a variety of ways.

The plurality also argues that no impermissible entanglement exists here. My Brother WHITE cogently comments upon that argument: "Why the federal program in the *Tilton* case is not embroiled with the same difficulties [as the Rhode Island program] is never adequately explained." *Post*, p. —. I do not see any significant difference in the Federal Government telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island telling the Catholic school teacher not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university. The plurality suggests that the facts that college students are less impressionable and that college courses are less susceptible to religious permeation

may lessen the need for federal policing. But the record shows that such policing has occurred and occurred in a heavy-handed way. Given the dangers of self-censorship in such a situation, I cannot agree that the dangers of entanglement are insubstantial. Finally, the plurality suggests that the "non-ideological" nature of a building, as contrasted with a teacher, reduces the need for policing. But the Federal Government imposes restrictions on every class taught in the federally assisted building. It is therefore not the "non-ideological" building which is policed; rather it is the courses given there and the teachers who teach them. Thus the policing is precisely the same as under the state statutes, and that is what offends the Constitution.

V

I, therefore, agree that the two state statutes that focus primarily on providing public funds to sectarian schools are unconstitutional. However, the federal statute in No. 153 is a general program of construction grants to all colleges and universities, including sectarian institutions. Since I believe the statute's extension of eligibility to sectarian institutions is severable from the broad general program authorized, I would hold the Higher Education Facilities Act unconstitutional only insofar as it authorized grants of federal tax monies to sectarian institutions—institutions that have a purpose or function to propagate or advance a particular religion. Therefore, if the District Court determines that any of the four institutional appellees here are "sectarian," that court, in my view, should enjoin the appellees from making grants to it.

SUPREME COURT OF THE UNITED STATES

No. 89.—October Term, 1970*

Alton J. Lemon et al., Appellants, *v.* David H. Kurtzman, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[June 28, 1971]

Mr. Justice White, concurring in part and dissenting in part.

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental functions and not only undertook secular education as a public responsibility but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. The Federal Government also asserts that it is entitled, where requested, to contribute to the cost of secular education by furnishing buildings and facilities to all institutions of higher learning, public and private alike. Both the United States and the States urge that if parents choose to have their children receive instruction in the required sec-

*Together with No. 153, *Eleanor Taft Tilton et al.* v. *Elliot L. Richardson et al.*; No. 569, *John R. Earley et al.* v. *Joan DiCenso et al.*, and No. 570, *William P. Robinson, Jr., et al.*, v. *Joan DiCenso et al.*

ular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school.

The issue is fairly joined. It is precisely the kind of issue the Constitution contemplates this Court must ultimately decide. This is true although neither affirmance nor reversal of any of these cases follows automatically from the spare language of the First Amendment, from its history or from the cases of this Court construing it and even though reasonable men can very easily and sensibly differ over the import of that language.

But, while the decision of the Court is legitimate, it is surely quite wrong in overturning the Pennsylvania and Rhode Island statutes on the ground that they amount to an establishment of religion forbidden by the First Amendment.

No one in these cases questions the constitutional right of parents to satisfy their state-imposed obligation to educate their children by sending them to private schools, sectarian or otherwise, as long as those schools meet minimum standards established for secular instruction. The States are not only permitted, but required by the Constitution, to free students attending private schools from any public school attendance obligation. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). The States may also furnish transportation for students, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and books for teaching secular subjects to students attending parochial and other private as well as public schools, *Board of Education* v. *Allen*, 392 U. S. 236 (1968); we have also upheld arrangements whereby students are released from

public school classes so that they may attend religious instructions. *Zorach* v. *Clausen,* 343 U. S. 306 (1952). Outside the field of education, we have upheld Sunday closing laws, *McGowan* v. *Maryland,* 366 U. S. 420 (1961), state and federal laws exempting church property and church activity from taxation, *Walz* v. *Tax Commission,* 397 U. S. 664 (1970), and governmental grants to religious organizations for the purpose of financing improvements in the facilities of hospitals managed and controlled by religious orders. *Bradfield* v. *Roberts,* 175 U. S. 291 (1899).

Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions. See *Board of Education* v. *Allen, supra,* at 248. Our cases also recognize that legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions do not constitute "law[s] respecting an establishment of religion" forbidden by the First Amendment merely because a secular program may incidentally benefit a church in fulfilling its religious mission. That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion.

This much the Court squarely holds in the *Tilton* case, where it also expressly rejects the notion that payments made directly to a religious institution are without more forbidden by the First Amendment. In *Tilton,* the Court decides that the Federal Government may finance the separate function of secular education carried on in a parochial setting. It reaches this result although sectarian institutions undeniably will obtain substantial benefit from federal aid; without federal funding to provide adequate facilities for secular education, the student bodies of those institutions might remain stationary or

even decrease in size and the institutions might ultimately have to close their doors.

It is enough for me that the States are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion.

It is unnecessary, therefore, to urge that the Free Exercise Clause of the First Amendment at least permits government in some respects to modify and mould its secular programs out of express concern for free exercise values. See *Walz* v. *Tax Commission, supra,* at 673 (tax exemption for religious properties; "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself"); *Sherbert* v. *Verner,* 374 U. S. 398 (1963) (exemption of Seventh Day Adventist from eligibility requirements for unemployment insurance not only permitted but required by the Free Exercise Clause); *Zorach* v. *Clausen, supra,* at 313–314 (students excused from regular public school routine to obtain religious instruction; "[w]hen the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs"). See also *Abington School District* v. *Schempp,* 374 U. S. 203, 308 (1963) (dissenting opinion of MR. JUSTICE STEWART); *Welsh* v. *United States,* 398 U. S. 333, 367 (1970) (dissenting opinion of MR. JUSTICE WHITE). The Establishment Clause, however, coexists in the First Amendment with the Free Exercise Clause and the latter is surely relevant in cases such as these. Where a state program seeks to ensure the proper education of its young, in private as well as

public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.

I would sustain both the federal and the Rhode Island programs at issue in these cases, and I therefore concur in the result in No. 153 [1] and dissent from the judgment in Nos. 569 and 570. Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment in No. 89 for the reasons given below.

The Court strikes down the Rhode Island statute on its face. No fault is found with the secular purpose of the program; there is no suggestion that the purpose of the program was aid to religion disguised in secular attire. Nor does the Court find that the primary effect of the program is to aid religion rather than to implement secular goals. The Court nevertheless finds that impermissible "entanglement" will result from administration of the program. The reasoning is a curious and mystifying blend, but a critical factor appears to be an unwillingness to accept the District Court's express findings that on the evidence before it none of the teachers here involved mixed religious and secular instruction. Rather the District Court struck down the statute because it concluded that activities outside the secular classroom would probably have a religious content and that support for religious education therefore necessarily resulted from the financial aid to the secular programs, since that aid generally strengthened the parochial schools and increased the number of their students.

In view of the decision in *Tilton,* however, where these same factors were found insufficient to invalidate the

[1] I accept the Court's invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years.

federal plan, the Court is forced to other considerations. Accepting the District Court's observation that education is an integral part of the religious mission of the Catholic church—an observation that should neither surprise nor alarm anyone, especially judges who have already approved substantial aid to parochial schools in various forms—the majority then interposes findings and conclusions that the District Court expressly abjured, namely, that nuns, clerics and dedicated Catholic laymen unavoidably pose a grave risk in that they might not be able to put aside their religion in the secular classroom. Although stopping short of considering them untrustworthy, the Court concludes that for them the difficulties of avoiding teaching religion along with secular subjects would pose intolerable risks and would in any event entail an unacceptable enforcement regime. Thus, the potential for impermissible fostering of religion in secular classrooms — an untested assumption of the Court — paradoxically renders unacceptable the State's efforts at insuring that secular teachers under religious discipline successfully avoid conflicts between the religious mission of the school and the secular purpose of the State's education program.

The difficulty with this is twofold. In the first place, it is contrary to the evidence and the District Court's findings. The Court points to nothing in this record indicating that any participating teacher had inserted religion into his secular teaching or had had any difficulty in avoiding doing so. The testimony of the teachers was quite the contrary. The District Court expressly found that "[t]his concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school. This testi-

mony gains added credibility from the fact that several of the teachers were non-Catholics. Moreover, because of the restrictions of Rhode Island's textbook loan law . . . and the explicit requirement of the Salary Supplement Act, teaching materials used by applicants for aid must be approved for use in the public schools." *DiCenso* v. *Robinson*, 316 F. Supp. 112, 117 (R. I. 1970). Elsewhere, the District Court reiterated that the defect of the Rhode Island statute was "not that religious doctrine overtly intrudes into all instruction," *id.*, at 117, but factors aside from secular courses plus the fact that good secular teaching was itself essential for implementing the religious mission of the parochial school.

Secondly, the Court accepts the model for the Catholic elementary and secondary schools that it rejected for the Catholic universities or colleges in the *Tilton* case. There it was urged that the Catholic condition of higher learning was an integral part of the religious mission of the church and that these institutions did everything they could to foster the faith. The Court's response was that on the record before it none of the involved institutions was shown to have complied with the model and that it would not purport to pass on cases not before it. Here, however, the Court strikes down this Rhode Island statute based primarily on its own model and its own suppositions and unsupported views of what is likely to happen in Rhode Island parochial school classrooms, although on this record there is no indication that entanglement difficulties will accompany the salary supplement program.

The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to

give—and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.

Why the federal program in the *Tilton* case is not embroiled with the same difficulties is never adequately explained. Surely the notion that college students are more mature and resistant to indoctrination is a make-weight, for the Court in *Tilton* is careful to note the federal condition on funding and the enforcement mechanism available. If religious teaching in federally financed buildings was permitted, the powers of resistance of college students would in no way save the federal scheme. Nor can I imagine on what basis the Court finds college clerics more reliable in keeping promises than their counterparts in elementary and secondary schools—particularly those in the Rhode Island case, since within five years the majority of teachers in Rhode Island parochial schools will be lay persons, with many of them being non-Catholic.

Both the District Court and this Court have seized on the Rhode Island formula for supplementing teachers' salaries since it requires the State to verify the amount of school money spent for secular as distinguished from religious purposes. Only teachers in those schools having per pupil expenditures for secular subjects below the state average qualify under the system, an aspect of the state scheme which is said to provoke serious "entanglement." But this is also a slender reed on which to strike down this law, for as the District Court found, only once since the inception of the program has it been necessary to segregate expenditures in this manner.

The District Court also focused on the recurring nature of state payments; salaries must be supplemented and money appropriated every year and hence the opportunity for controversey and friction over state aid to religious schools will constantly remain before the State.

The majority adopts this theme and makes much of the fact that under the federal scheme the grant to a religious institution is a one-time matter. But this argument is without real force. It is apparent that federal interest in any grant will be a continuing one since the conditions attached to the grant must be enforced. More important, the federal grant program is an ongoing one. The same grant will not be repeated, but new ones to the same or different schools will be made year after year. Thus the same potential for recurring political controversy accompanies the federal program. Rhode Island may have the problem of appropriating money each year to supplement the salaries of teachers, but the United States must each year seek financing for the new grants it desires to make and must supervise the ones already on the record.

With respect to Pennsylvania, the Court, accepting as true the factual allegations of the complaint, as it must for purposes of a motion to dismiss, would reverse the dismissal of the complaint and invalidate the legislation. The critical allegations, as paraphrased by the Court, are that "the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose." *Lemon* v. *Kurtzman, ante,* p. 15. From these allegations the Court concludes that forbidden entanglements would follow from enforcing compliance with the secular purpose for which the state money is being paid.

I disagree. There is no specific allegation in the complaint that sectarian teaching does or would invade secular classes supported by state funds. That the schools are operated to promote a particular religion is quite consistent with the view that secular teaching devoid of religious instruction can successfully be maintained, for good secular instruction is, as Judge Coffin wrote for the

District Court in the Rhode Island case, essential to the success of the religious mission of the parochial school. I would no more here than in the Rhode Island case substitute presumption for proof that religion is or would be taught in state financed secular courses or assume that enforcement measures would be so extensive as to border on a free exercise violation. We should not forget that the Pennsylvania statute does not compel church schools to accept state funds. I cannot hold that the First Amendment forbids an agreement between the school and the State that the state funds would be used only to teach secular subjects.

I do agree, however, that the complaint should not have been dismissed for failure to state a cause of action. Although it did not specifically allege that the schools involved mixed religious teaching with secular subjects, the complaint did allege that the schools were operated to fulfill religious purposes and one of the legal theories stated in the complaint was that the Pennslyvania Act "finances and participates in the blending of sectarian and secular instruction." At trial under this complaint, evidence showing such a blend in a course supported by state funds would appear to be admissible and, if credited, would establish financing of religious instruction by the State. Hence I would reverse the judgment of the District Court and remand the case for trial, thereby holding the Pennsylvania legislation valid on its face but leaving open the question of its validity as applied to the particular facts of this case.

I find it very difficult to follow the Court in distinguishing between the federal and state programs in terms of their First Amendment acceptability. My difficulty is not surprising, for the Court with candor acknowledges that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Tilton* v. *Richardson, ante,*

p. 5, and that the "caveat against entanglements" is a "blurred, indistinct and variable barrier." *Lemon* v. *Kurtzman, ante,* p. 9. I find it even more difficult, with these acknowledgments in mind, to understand how the Court can accept the considered judgment of Congress that its program is constitutional and yet reject the equally considered decisions of the Rhode Island and Pennsylvania legislatures that their programs represent a constitutionally acceptable accommodation between church and state.[2]

[2] As a postscript I should note that the Court decides both the federal and state cases on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.